

No. 15052

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United States  
Court of Appeals  
for the Ninth Circuit

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EMPIRE PRINTING COMPANY, a Corporation,  
Appellant,

vs.

HENRY RODEN, ERNEST GRUENING and  
FRANK A. METCALF,  
Appellees.

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Transcript of Record  
In Two Volumes

Volume II  
(Pages 355 to 703)

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FILE

Appeal from the District Court  
for the District of Alaska,  
First Division

JUN -7 1956

PAUL P. O'BRIEN, C



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Q. Did you acquire a man to take care of the books and handle and recapitulate the reports of Mr. Coughlin so that the Board would know what was going on?

(Testimony of Frank A. Metcalf.)

A. I had to have a comprehensive set of books so I went to [238] a C.P.A. there in Juneau and asked him if he would fix me up a set of books. He bought the books and set them up the way they should go. I turned in a voucher for this work, and it was refused by the Auditor because he said that was his business, but he had refused to do it prior to that, and it wasn't until an action of the Territorial Legislature that he finally got paid for the work that I had been refused by the Auditor.

Q. When you say "he finally got paid," do you make reference to the bookkeeper you finally got?

A. Yes.

Q. Now, who was that man?

A. It was Chris Ehrendreich.

Q. And was he an accountant?

A. He is a certified public accountant with an office there in Juneau.

Q. He has an office in Juneau?

A. He has an office in Juneau.

Q. Now, do you recall how long after June 5th it was that you asked Mr. Moore to set you up a method of bookkeeping?

A. It was soon after the action of the Board. I wanted something to go by.

Q. You mean, shortly after June 5, 1952?

A. Yes; immediately after, you might say.

(Testimony of Frank A. Metcalf.)

Q. Did you tell Mr. Moore the problem you were faced with [239] and what you were doing?

A. Yes.

Q. Now, after that and after having been refused the set of books or a bookkeeper by Mr. Moore, did you request Mr. Moore to make periodic audits of the operation of the Chilkoot based upon the books kept by your C.P.A.?

A. Yes, I did.

Q. Did Mr. Moore make such audits or cause his office to make such audits?

A. He refused twice.

Q. Can you state why he refused?

A. His excuse was he had no funds for an audit.

Q. Now, Mr. Metcalf, how often then would Mr. Ehrendreich, your bookkeeper, make reports in connection with the operation of the Chilkoot to your office and others?

A. He worked directly with our purser, and often, when I was not there, he made his reports to Ehrendreich direct.

Q. And did you examine Mr. Ehrendreich's reports periodically?      A. Yes.

Q. I will ask you whether or not Mr. Ehrendreich ever made any complaint in connection with the reports of the purser, Coughlin, or of any discrepancies in the method of handling the funds, to you?      A. Never; no. [240]

Q. Now, did you testify previously that you went out of office as Territorial Highway Engineer on April 1, 1953?      A. Yes.

Q. Was Mr. Ehrendreich keeping the books for

(Testimony of Frank A. Metcalf.)

the Board and in connection with the operation of the ferry up until the time you went out of office?

A. I think he was; yes.

Q. And then, up until the time you went out of office, is it your testimony that no complaint was ever made to you by Mr. Ehrendreich in connection with the method of handling the receipts and disbursements and the reports of the purser?

A. No, no complaints whatsoever.

Q. Now, inviting your attention again, Mr. Metcalf, to the front page of the publication of the Daily Alaska Empire of September 25, 1952, Plaintiffs' Exhibit 1, I will ask you whether or not any representative of the Daily Alaska Empire contacted you requesting information in connection with this fund prior to the date of publication?

A. Yes.

Q. And can you state who that person was?

A. The reporter from the Empire by the name of Daum.

Q. Would that be Mr. Jack Daum?

A. Yes.

Q. And what request did he make of you in connection with [241] the fund?

A. The first request was to see the minutes of the meeting authorizing that. I called in my administrative assistant who produced the minutes.

Q. Are those the minutes that were introduced as Plaintiffs' Exhibit 9?

A. The same ones; yes.

Q. All right. Go ahead.

(Testimony of Frank A. Metcalf.)

A. I went further into it. I explained the whole situation of why we were doing it, for the relief of not only the men that were working for us, in order to get their money when it was due, and to simplify the handling of the operations of the ferry. I went into it very thoroughly, explained the whole situation. I had nothing to hide and gave him every help I could.

Q. Did Mr. Jack Daum ever check back with you, after that meeting with you and prior to this publication, requesting any additional information?

A. No, sir, he didn't.

Q. Now, Mr. Metcalf, I will ask you whether or not you suffered any humiliation or mental pain or anguish after reading that front page of the September 25th publication?

A. I most certainly did.

Q. Will you explain just briefly to the Court and the jury what you mean when you say "I most certainly did"? [242]

A. Well, I had gone all out to give him all the information there was to be given. That information was twisted around and made to look like the admission of guilt, which there was no particle of foundation for.

Q. Now, I will ask you whether or not you suffered any damage to your reputation as a result of that publication as a whole or of the items on that page of which we have complained?

A. I most certainly did.

Q. Can you state briefly to the Court and the jury how you did suffer damage to your reputation?



(Testimony of Frank A. Metcalf.)

A. I don't see how it could be figured any other way. I have handled funds for mining companies of which I have had not only interest in but I have done work for, and I have never had my integrity questioned before, and I have lived in the Territory long enough to establish a reputation which I am very envious of.

Q. Can you state, Mr. Metcalf, whether or not you suffered any damage to your professional status as a civil and mining engineer by reason of that publication of September 25th?

A. I undoubtedly did. I feel a very personal situation which I had no way of refuting.

Q. How long did you—how old are you, Mr. Metcalf?      A. Seventy-three. [243]

Q. And how long did you say you had been in the Territory?      A. Forty-three years.

Q. Now, Mr. Metcalf, was any audit—I mean audit as such—made of the Chilkoot Ferry fund and the bank account by any Seattle firm during the period that you held office as Territorial Highway Engineer?

A. Yes. They made a general audit of all the departments of the Territory, including the Highway Engineer's Office and—

Q. Was that—pardon me.

A. —and as a part of the Engineer's Office was the Chilkoot account, and that was audited along with the regular audit.

Q. But my question was—was that audit or any audit made of the Chilkoot Ferry fund before you went out of office on April 1, 1953?

(Testimony of Frank A. Metcalf.)

A. Yes. It was made prior to that.

Q. Was the audit as such made prior to your going out of office, or did the audit that was made cover the period that you held office or approximately that?

A. It covered the period, and the audit came out after my having left office.

Q. Then, I will put the question again. Was the audit, the actual work of auditing those books in connection with the Chilkoot fund, made while you were in the office and [244] still holding the official status of the Highway Engineer? A. Yes.

Q. Was it your testimony that the audit was completed after you left the office as Territorial Highway Engineer? A. Yes.

Q. And did these people conducting the audit ever contact you in connection with any matters regarding the Chilkoot fund? A. No.

Q. Well, were they in your office, Mr. Metcalf, prior to April 1, 1953?

A. Yes. They were in my office and made the audit from my books.

Q. They never asked you, or, rather, did they ever ask you about any matters in connection with the fund? A. No.

Q. Or the method of handling the books?

A. No.

Q. Or anything in connection with their audit duties? A. No.

Q. Now, Mr. Metcalf, will you look, or, rather, please let me have this copy of our Exhibit 1, Plain-

(Testimony of Frank A. Metcalf.)

tiffs' Exhibit 1, and I will ask you to look at this headline which reads in bold black type "Bare 'Special' Ferry Fund," and I will ask you whether or not that headline is a [245] true and correct statement of the status or situation existing on September 25, 1952?      A. No, it is not.

Q. Will you state to the Court and the jury in what respect it is not a true and correct statement?

A. Well, that infers an uncovering of something which nobody knew anything about and something that was private or secret. There never was anything secret about the fund.

Q. Was there anything secret about the method of handling the receipts and disbursements?

A. No.

Q. Were those minutes, that I introduced as Exhibit 9, in your office from eight to five each and every working day, available to the inspection of the public?      A. Yes, sir.

Q. And did you testify previously that you had explained your situation to Mr. Moore, the Auditor, shortly after June 5, 1952, asking assistance?

A. Yes.

Q. Then, is it a fact that Mr. Moore knew about the method shortly after June 5, 1952?

A. Yes, he did.

Q. Now, Mr. Metcalf, I ask you to look at the subheadline or smaller headline above the Chilkoot Ferry check, of which a photostat is reproduced on the front page, [246] "Reeve Raps Graft, Corruption," reading that in connection with the place-

(Testimony of Frank A. Metcalf.)

ment of the photostat of the check, and ask you if that particular piece of reporting reflects a true and correct situation with respect to the fund?

A. No, not at all, because that refers directly to that check, or the inference would be that that check was in connection with the words of "graft" and "corruption" and refer to the reproduction of that check.

Q. Now, you have read the article which actually accompanies this headline "Reeve Raps Graft, Corruption," have you not? A. Yes.

Q. That article which is headlined "Reeve Raps Graft, Corruption," as a matter of fact, has nothing whatever to do with the Chilkoot Ferry fund, does it? A. No, sir.

Q. Now, please look at this subheadline, which is to be read, apparently, in connection with the large headline, "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account," and I will ask you whether or not that reflects a true and accurate statement in connection with the use and operation of the fund? A. It does not.

Q. Will you state in what respects it does not reflect [247] itself as a true and accurate statement?

A. Well, the word "Divert" refers more to a change of course, and the word "Private"—it was not private in any manner whatsoever.

Q. Is there any such thing as a public bank account in contrast to a private bank account, as they describe it here?

(Testimony of Frank A. Metcalf.)

A. I don't see how you could get a public bank account. That would be open to anybody.

Q. Well, as a matter of fact, where were the funds of the Territory kept for safekeeping, Mr. Metcalf?

A. In depositories all over the Territory.

Q. That would be in private banks, wouldn't it?

A. Private banks.

Q. Well, was—strike that. Now, I call your attention to the first paragraph under the heading which says "By Jack D. Daum," reading as follows: "To avoid paying Territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a 'special fund' at a Juneau bank, Territorial Auditor Neil Moore disclosed today." And I ask you whether or not that paragraph that I just read is a true and accurate statement of the situation of the fund as of September 25, 1952?

A. I didn't quite get your question. [248]

Q. Well—"To avoid paying Territorial money into the general fund as provided by law, Governor Gruening," etc.—does that portion of that paragraph, which is the lead-off of the explanation, apparently, of the three different types of headlines above it, is that phrase a true reflection of the actual status or the reasons of the Board for the establishment of the fund?

A. No, indeed; not in the least.

Q. Now, further along in that same print in

(Testimony of Frank A. Metcalf.)

connection with the same large bold headline and the two subheadlines there is the wording: "Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged." I will ask you whether or not that statement is true and accurate. I invite your attention particularly to the wording "and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date."

A. There was thousands of dollars deposited, but they were not legal—they were not illegal.

Q. Now, under even a fourth type of headline, or paragraph headline, you might say, entitled "Illegal Payments," I invite your attention to this wording: "The 'special fund,' which dates back to early last year, is in the [249] B. M. Behrends bank under the name 'Chilkoot Ferry—by Robert E. Coughlin.'" Now, the words, "The 'special fund,' which dates back to early last year," does that phrase—is that phrase true and accurate?

A. No.

Q. In what respect is it not true and accurate?

A. It was only a few months old.

Q. How old was the fund at the time this publication was made?

A. Oh, about three months.

Q. It had been established shortly after June 5, 1952, hadn't it?

A. Yes.

(Testimony of Frank A. Metcalf.)

Q. This publication was in September of '52, was it not?           A. Yes.

Q. Would that not make the fund approximately three and a half months old?           A. Just about.

Q. Then, the words, "The 'special fund,' which dates back to early last year," referring to early in 1951, is false, is it not?           A. Absolutely.

Q. Did you even own the ferry, the Territory, I mean, early in '51?           A. No. [250]

Q. Now, Mr. Metcalf, I invite your attention to Paragraph 2, still dealing with the feature article, the wording as follows: "After learning of the unauthorized account late last month, Auditor Moore and Assistant Attorney General John Dimond ordered the bank to stop payment on all checks drawn against the account." Can you state whether or not that paragraph is true and correct?

A. No; because he knew about it earlier than the month before that.

Q. Now, who knew about it earlier?

A. Neil Moore, the Auditor.

Q. When did he know about the existence of the fund?

A. Immediately after the fund was created.

Q. And I will ask you whether or not, as a matter of fact, Auditor Moore and Assistant Attorney General John Dimond did close that account?

A. I don't think so.

Q. Now, Mr. Metcalf, in Paragraph 3 under the heading "Illegal Payments" in rather bold type the article reads as follows: "The case closely paral-

(Testimony of Frank A. Metcalf.)

nels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds"; and ask you whether or not that paragraph is true and correct? [251]      A. No parallelism whatsoever.

Q. Do you know why Oscar Olson was serving time at McNeil Island penitentiary as of September 25, 1952?

A. On account of embezzlement.

Q. Embezzlement of Territorial funds?

A. Territorial funds.

Q. By embezzlement do you mean the legal definition of taking funds and using them for his own personal purposes?      A. Yes.

Q. Now, as a paragraph headline in the feature article, printed in rather bold type, in connection with this section of the article is the wording, the title wording, paragraph title wording, "Bookkeeping Trick." I am reading from the exhibit: "The special account, established and maintained without knowledge of the Territorial Auditor, was set up to enable the Highway Engineer, Frank Metcalf, to keep the ferry receipts out of the normal channels of Territorial finances, Moore declared. Metcalf labeled the move a 'trick of bookkeeping' which permits him to operate the ferry without depleting the funds given him by the Legislature to run his department." Now, I will ask you whether or not you made any statement to Mr. Daum or any other representative of the Daily Alaska Empire to the effect that the new method



(Testimony of Frank A. Metcalf.)

of handling the receipts and disbursements was a "trick of [252] bookkeeping"?

A. No, I never did.

Q. Are you positive that you never used that expression? A. No, I never did.

Q. Are you a bookkeeper?

A. No. That is the reason I tried to hire Neil Moore to set up the books for me because I was not a bookkeeper. I wouldn't know anything about a bookkeeping trick.

Q. Now, Mr. Metcalf, still in connection with the feature article under the banner headline "Bare 'Special' Ferry Fund" and under the subparagraph, subheading "Governor Absent," this paragraph appears, and I am reading from the exhibit: "When questioned by an Empire reporter, Metcalf produced a record of the June 6, 1951, meeting of the Board of Road Commissioners, attended by himself, Roden, Gruening and J. Gerald Williams, Territorial Attorney General"; and ask you whether or not the date mentioned in that paragraph is correct? A. Neither the day nor the year.

Q. The date that I am reading is "June 6, 1951." Will you state to the Court and the jury when the meeting was actually held? A. June 5, 1952.

Q. In the last paragraph on the inside column, still dealing with the feature account, there appears the following [253] wording referring to the minutes of that meeting of June 5, 1952, and reading from the exhibit now: "Then, the minutes disclose, on a motion by Roden, the board decided to set up

(Testimony of Frank A. Metcalf.)

the 'special account' in a private bank. There the money could be deposited and spent without the knowledge or approval of the auditor. Such an account was opened at Behrends bank, under the name 'Robert E. Coughlin' instead of in the name of the board or of the highway engineer." Now, directing your attention to the words again "'special account' in a private bank." Does that phrase reflect truthfully and accurately the acts and reasons of the Board in connection with the fund?

A. No, it does not.

Q. Well, is "special account" at all applicable to this particular type fund?

Mr. Faulkner: If the Court please, I think this is really arguing with the witness and calling for a conclusion, for an interpretation. Mr. Metcalf said a few minutes ago it was a special account. Now, it speaks for itself. He has already testified it was. He used those words. And, of course, it appears on its face what it was.

The Court: I find the last question to be argumentative. The objection is sustained to the last question.

Q. (By Mr. Nesbett): I will ask you whether or not then, Mr. Metcalf, the wording in that same paragraph, "There [254] the money could be deposited and spent without the knowledge or approval of the auditor"—and ask you whether or not that was the intent of the Board in establishing the fund?

A. That was not the intent in any manner whatsoever.

(Testimony of Frank A. Metcalf.)

Q. Now, I am still dealing with the wording of that paragraph, where it says as follows: "Such an account was opened at Behrends bank, under the name 'Robert E. Coughlin' instead of in the name of the Board or of the highway engineer." Is that a true and accurate statement?

A. No, it is not.

Q. And in what respect was it false?

A. It was opened in the name of the Chilkoot Ferry.

Q. Was there any other title to the fund?

A. No.

Q. "Chilkoot Ferry?"

A. The "Chilkoot Ferry Fund" is what it was.

Q. The "Chilkoot Ferry Fund"; and was there a designation of a person to have access to that fund?

A. The purser on that boat.

Q. Who was the purser?

A. Robert Coughlin at the time.

Q. I will ask you whether or not the true title of the fund then was "Chilkoot Ferry By Robert E. Coughlin"?

A. Yes. [255]

Q. Now, did you have authority to write any checks on that fund?

A. No, sir.

Q. Did Treasurer Roden, even, have authority to write checks on that fund?

A. No.

Q. Did Governor Gruening have authority to write checks on that fund?

A. No, sir.

Q. Then, is it a fact that the only person authorized to write checks on that fund was Robert E. Coughlin?

(Testimony of Frank A. Metcalf.)

A. If it happened to be that Robert E. Coughlin was the purser at that time, and, if we got another purser, he would have had the authority.

Q. Now, inviting your attention to this photostat of the check reproduced on the front page of the edition of September 25th, payable to Steve Larsson Homer in the amount of \$398.04, can you state to the Court and the jury what that payment represented?

A. It represented an overtime which he claimed he had coming.

Q. The check is dated 20 August, 1952. I will ask you if you recall how long Mr. Steve Larsson Homer was employed during the year 1952 in connection with the Chilkoot operation? [256]

A. I think he was separated from the ferry about that same time.

Q. Was this check given to Mr. Homer in your office, or do you recall?

A. It was given to him in my office as a final payment.

Q. Final payment for what?

A. His services on the Chilkoot Ferry.

Q. Did his services terminate as of the date or approximately as of the date of this check?

A. Of the date of that check; yes.

Q. And who was responsible for terminating Mr. Homer's services?      A. The purser.

Q. Mr. Coughlin?      A. Mr. Coughlin.

Q. Were you present when that was done?

(Testimony of Frank A. Metcalf.)

A. I was there when the check was handed to him.

Q. Were you present when Mr. Coughlin discharged Mr. Homer?

A. He said—yes—he said, “We are through with you now.”

Q. Mr. Metcalf, again calling your attention to an article appearing on the front page of the September 25th publication with the headline “Roden, Metcalf Say ‘Nothing Crooked’ Here”—Nothing crooked here. I will ask you whether or not you made a statement to Mr. Daum or any other representative of the Daily Alaska Empire to the [257] effect that “Nothing is crooked here”?

A. No, I did not.

Q. Are you positive?

A. I am positive; yes.

Q. Mr. Metcalf, I invite your attention to additional wording under that headline “Roden, Metcalf Say ‘Nothing Crooked’ Here,” to wording to the effect that receipts from the operation of the ferry could not legally be used to pay ferry expenses. Is that a strictly true and accurate statement of the situation?      A. No, it is not.

Q. Upon whose advice, with respect to the legality of the fund, were you depending?

A. On the advice of the Attorney General.

Q. Now, Mr. Metcalf, reading the last paragraph of this article insofar as the column on Page 1 is concerned, which reads as follows: “If the law were disregarded and the receipts poured back into

(Testimony of Frank A. Metcalf.)

the ferry, the act would come to the attention of the Auditor of Alaska, who is the Territory's watchdog on money matters." I will ask you whether or not that paragraph makes any sense to you?

A. Not a particle; because he already knew it.

Q. Does the paragraph in and of itself, by the very wording, read carefully as follows: "If the law were disregarded [258] and the receipts poured back into the ferry, the act would come to the attention of the Auditor of Alaska, who is the Territory's watchdog on money matters."—Does it convey any thought or sense of continuity, in connection with the article as a whole, to you?

A. Not a bit.

Q. Inviting your attention, Mr. Metcalf, to the editorial entitled "Start Talking, Boys" and underneath it "(An Editorial)," what was your first reaction after reading that article in connection with the headline "Start Talking, Boys"?

A. Well, it is the first time I have ever seen an editorial on the first page of that or any other Empire, and then, referring to three elderly gentlemen as "Boys," it wasn't very complimentary.

Q. Now, in the next to the last paragraph of that editorial entitled "Start Talking, Boys" there is a paragraph that reads as follows, the wording is as follows: "But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the Territorial law is applicable to some and not to others or whether they acted in complete defiance to the law

(Testimony of Frank A. Metcalf.)

in the belief they would not be caught." And I ask you whether that is a true, accurate and fair statement of the situation? [259]

A. Not the slightest.

Q. I am inviting your attention particularly to the last five words, that "they would not be caught." What was your reaction to that wording?

A. Implies that we had been using funds illegally, which we were not.

Q. The last paragraph reads as follows: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought Territorial laws were only for the underlings." What was your reaction when you read that last paragraph of this editorial?

A. Well, that was just about the last straw.

Q. Why?

A. After having gone through all the rest of it, it finally compares us to occupants of a prison cell.

Q. Mr. Metcalf, do you know where Mr. Robert E. Coughlin, who was purser of the Chilkoot, is today? A. He died a few weeks ago.

Q. In Juneau? A. Yes.

Mr. Nesbett: No further questions, may it please the Court.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial [260] proceeded as follows:)

(Testimony of Frank A. Metcalf.)

Cross-Examination

By Mr. Faulkner:

Q. Mr. Metcalf, you said in answer to the last question asked you that Mr. Coughlin, the purser of the ferry who had this account in his name, died a few weeks ago?      A. Yes.

Q. That was about three years after this publication was made, was it?      A. Yes.

Q. Did you at any time in that period of three years make any attempt to take his deposition to bring here to the jury?      A. No; no, I didn't.

Q. Now, do you know how the ferry account stands, that special account, today?

A. I haven't seen it; no.

Q. Well, do you know anything about the records, about the receipts and disbursements, just what the money was disbursed for?

A. They are all in the—in our auditor's office, I imagine.

Q. Which auditor?

A. In the Ehrendreich office.

Q. Well, did you make any attempt to bring him here? [261]      A. No.

Q. What records does he have?

A. He has the books that were opened and used during the operation of the ferry.

Q. When were they given to him; do you know?

A. Soon after Neil Moore refused to do anything with it.



(Testimony of Frank A. Metcalf.)

Q. And he made—how many reports did he make on that?

A. I don't know offhand how many there were.

Q. Well, did he make more than two?

A. I couldn't say.

Q. Well, you don't know. And you don't know as to just how that account stands today, or how it stood at the end of 1952?

A. No; I didn't see it.

Q. You have made no examination of it for the purpose of this case; have you?      A. No.

Q. Now, Mr. Metcalf, I will ask you if Mr. Ehrendreich didn't become concerned with these ferry books sometime after this publication appeared? Is that right or not?

A. Well, I wouldn't say to that. It was during that—1952.

Q. Yes; in 1952 he came into it. Do you know when in 1952?      A. Offhand, I don't.

Q. Do you know anything about any of his audits or examination of these accounts? [262]

A. No.

Q. Well, I will ask you if you know of an audit of the ferry, special ferry account made by Mr. Ehrendreich on October 10, 1952? Did you ever see that?

A. I think there is a copy of that in my office, or was.

The Court: Counsel, I do not wish to preclude you from going into this audit if you deem it material. It was gone into on the cross-examination of

(Testimony of Frank A. Metcalf.)

Neil Moore, in the deposition, by both sides without objection. But do you feel that anything which appeared, which was done, or an audit made after the publication of this account might be material?

Mr. Faulkner: Yes, Your Honor; yes. That reflects the state of the account up to this date. The purpose of this—the plaintiffs claim that the publication was false, and they claim there was no—I mean, they claim there was no shortage of funds. Now, they also claim it was a matter of convenience and expediency to handle the Territorial funds in that way, and I take it that no one would complain if everything went all right, if they had not done it according to law or violated the Territorial statutes, but here there is a loss of money. I think it is an entirely different thing, and I think we have a right to show what happened to these funds and that there was a considerable loss.

The Court: Would you have that right, Mr. Faulkner, unless it was shown that the publisher of the Daily Alaska [263] Empire or members of its staff knew of such shortage at the time of the publication?

Mr. Faulkner: Oh, yes.

The Court: Must that be——

Mr. Faulkner: Yes, sir. That is very well-settled, that the truth in a libel case is admissible whenever and wherever found, and it doesn't make any difference where. If a person says, if a paper publishes, that a man committed manslaughter, and he can't prove it for a week, but it developed that they

(Testimony of Frank A. Metcalf.)

found it out a week later, it is still a defense if the man should sue you for libel because they didn't know it. That would be too farfetched. The truth—that is one of the fundamental principles of the law of libel, that truth is a defense whenever and wherever found.

The Court: Well, but now here is this point. Supposing, under the evidence here, this account being handled by the purser, supposing he came up with a shortage of funds, would the plaintiffs here be liable for such shortage?

Mr. Faulkner: Yes, your Honor.

The Court: Criminally liable?

Mr. Faulkner: He was their agent.

The Court: Criminally liable?

Mr. Faulkner: I think so; because they would be liable under that statute which they did not obey, and their possession; or his possession of the money is their possession [264] under the law.

The Court: Which would be criminal liability only upon the theory of an accessory, would it not? The relation of master and servant has no relation to criminal law. It must be shown to be an accessory.

Mr. Faulkner: Well, where here the Territorial officials, who say, "We are not going to obey the law; we are going to change it; we are going to use some other system; we are not obeying the law"—

Mr. Nesbett: Your Honor; pardon me. I think, your Honor, if Mr. Faulkner is going to make any

(Testimony of Frank A. Metcalf.)

speeches, it should be out of the presence of the jury.

The Court: Well, I find nothing——

Mr. Nesbett: I agree that I don't think it is material, but where the error commenced, as your Honor very aptly pointed out, was in the direct examination, or cross-examination of Neil Moore by Mr. Faulkner and we both stipulating that it could all go in.

The Court: Yes.

Mr. Nesbett: That point, insofar as the front page of the paper is concerned, they are not charged with being responsible for any shortage of funds in any manner whatsoever. This is completely irrelevant even if there was a discrepancy.

The Court: Well, that is what I have been debating, [265] but the other testimony went in without objection by stipulation, and that is why we could not hold it to be irrelevant. I think, having gone into it, that defendant then should not be precluded from pursuing the inquiry further, but, whether it is relevant then, well, we will try and instruct the jury whether the matter is relevant and they may consider such subject. My only thought is in interrupting you, counsel, that, if the matter is not relevant, we do not desire to take up needless time with it, but, if you feel that it is, you may pursue the inquiry.

Mr. Faulkner: Oh, I certainly do, your Honor, and I have these exhibits here, and I think that is very material, very material in this case.

(Testimony of Frank A. Metcalf.)

Q. (By Mr. Faulkner): Mr. Metcalf, I will ask you if you know of an audit made by Mr.—two audits made by Mr. Ehrendreich on October 10, 1952, the same day, covering this ferry account up to September 30, 1952? Do you know of that?

A. I don't know; I don't remember of having seen it; no.

Q. Well, supposing I show you this and ask if you recognize those two audits?

A. I don't remember having seen it.

Q. Do you remember having seen either one of them? A. No, sir.

Q. They are addressed to you and filed in your office; weren't [266] they—addressed to the Board and filed in your office as Highway Engineer?

A. Highway Engineer Irving Reed.

Q. No. But look at the date of the audit.

A. October 10, 1952.

Q. And the signature?

Mr. Nesbett: When was the audit completed and filed? That is the date.

Mr. Kay: He said '52.

Mr. Nesbett: When it was filed in the office?

The Court: He had referred to the date October 10, 1952.

Mr. Faulkner: Yes.

A. It was probably on file in my office; yes.

Q. (By Mr. Faulkner): You think it was on file?

A. Yes. It is on file in my office because it is sworn to by——

(Testimony of Frank A. Metcalf.)

Q. Certified?           A. Certified by the——

Mr. Faulkner: We would like to offer these two, this exhibit, as the Defendant's Exhibit No. . . .C?

The Clerk: C.

Mr. Faulkner: In connection with the cross-examination——

Mr. Nesbett: I object. I believe in the first [267] place, as I said before, it is irrelevant to this case. There is no charge—we are not trying this case on a question of whether or not there was or was not a small shortage or on any audit, and, furthermore, the witness, Frank Metcalf, says he does not recognize it; he is not familiar with it; therefore, how can it be admitted?

Mr. Faulkner: Your Honor, I have some questions about it.

Mr. Nesbett: If they can identify it themselves when they put their case on, why, that is one thing; but the witness said he is not familiar with it, doesn't recall having seen it, although he admits that it may be in the office he used to occupy. It is not enough to permit the introduction.

The Court: I fear that it has not been sufficiently identified.

Mr. Faulkner: It doesn't need to be identified, your Honor. The introduction is then under Rule 44 of the Rules of Civil Procedure. I think that is the rule. That is the rule.

The Court: A certified copy of public records?

Mr. Faulkner: A certified copy of public records, authenticated by the Secretary of Alaska.

(Testimony of Frank A. Metcalf.)

The Court: It may be admitted under that rule. However, I think that the jury should be instructed now that [268] this audit is not permitted to be introduced as in any way bearing upon any criminal responsibility of the officials who are the plaintiffs in this suit for any possible shortage in the accounts of the purser, Mr. Coughlin, for which they would not be responsible. They would be responsible to account for such funds as their employee, the Board's employee, but not for any alleged crime or wrongful criminal act, and it is only introduced for the purpose of bearing upon the question of whether or not the publication here complained of was true or false.

Mr. Faulkner: That is true, your Honor, and I agree with your Honor.

The Court: Very well.

Mr. Faulkner: It is not admissible for that purpose at all, and we are not charging that, but we are offering it for the purpose of showing that these plaintiffs did not follow the law in the setting up of this fund, and what happened to the funds, as I stated, and for the purpose of arguing the matter if there wasn't a loss of funds. I will just take this a minute and I will bring it back.

Q. (By Mr. Faulkner): Now, Mr. Metcalf—

Mr. Nesbett: Pardon me. Was that Exhibit C or D?

The Clerk: That is C.

Q. (By Mr. Faulkner): Mr. Metcalf, these two reports I show you by Mr. Ehrendreich, in one of

(Testimony of Frank A. Metcalf.)

them, one of them is [269] marked Short Form for Publication—"Short Statement for Publication," and the other is not so labeled. Now, the other one, Mr. Ehrendreich says: "We were unable to verify the \$4,106.07——"

Mr. Nesbett: Where is that?

Mr. Faulkner: That is on the first page of the second one; right down below there.

Q. (By Mr. Faulkner): "——unable to verify the \$4,106.07 alleged to have been paid for advances; however we have no reason to doubt that they had actually been paid as claimed." Do you remember Mr. Ehrendreich going into that matter with you?

A. No; he didn't go into it with me.

Q. Well, as a matter of fact—let me go back—didn't you go to Mr. Ehrendreich's office with Mr. Coughlin and request him to audit these ferry books after this publication was made?

A. I don't remember of going there with Mr. Coughlin. I remember requesting an audit by Mr. Ehrendreich.

Q. And this is the audit that was made?

A. I imagine that is the one.

Q. Now, then do you remember here that he found that there were certain checks—that is on the bottom of the page there—No. 16—no—there were three checks in the sum of \$100.00 each issued to—yes; that is on the second page— [270] issued to Mr. Coughlin, Checks Nos. 8, 13 and 15, issued in 1952 for \$100.00 each, and there was no record of their having been paid back, and that he relied on



(Testimony of Frank A. Metcalf.)

Mr. Coughlin's statement that they had; do you remember that, going over that with Mr. Ehrendreich?      A. No, I don't.

Q. Do you remember Mr. Ehrendreich reported—at the bottom of the first page—that there were two checks issued to Steve Larsson Homer—no—one in the sum of \$100.00 to Steve Larsson Homer under the caption of "Personal Loan," and one for \$107.06 issued to the Moore Hotel for Steve Larsson Homer's account, which funds had not been paid back into the ferry account?

A. I think that second check was during the time when we were in Seattle on the reconstruction of the ferry boat.

Q. When was that?

A. That was in the spring of '52.

Q. And those two checks were issued down there? Now, Mr. Ehrendreich found there was no record of their having been paid back?      A. No.

Q. In this report—well, I don't need to ask you that question. Now, Mr. Metcalf, this second report here is labeled "Short Statement for Publication," and that report does not contain any reference to not being able [271] to reconcile \$4,106.00, and it doesn't contain any reference to these checks which were issued and which Coughlin had claimed were paid back, but there was no record of them. Now, can you tell the Court and jury why you had two made on the same day, one marked "Statement for Publication" and the other not marked that way? Do you recall that?

(Testimony of Frank A. Metcalf.)

A. No; I don't recall why there were two.

Q. But one does contain that evidence or that statement about the shortages, and the other one doesn't. The one that was published here in the *Juneau Independent* a few days later was the "Short Statement for Publication"; do you remember that?

A. I remember seeing it in the paper but I don't remember.

Q. Now, Mr. Metcalf, I will ask you this. Mr. Coughlin had this account set up in the name, I think you said, "Chilkoot Ferry by Robert E. Coughlin"; is that correct?      A. Yes.

Q. And Mr. Coughlin was the only one with authority to issue checks?      A. That is true.

Q. Now, did you ever consider what would happen to that fund if Mr. Coughlin died; how did you expect to get it?

A. Well, as I made the statement a while ago, it was left open for our purser. [272]

Q. Yes; but you didn't have anything about a purser on the account?

A. Well, I don't think Robert Coughlin's name was on the account.

Q. Did you bring the ledger sheets here from the bank?      A. No.

Q. The bank reports that come monthly?

A. No.

Q. Well, why didn't you bring those, Mr. Metcalf?      A. I wasn't asked to bring them.

(Testimony of Frank A. Metcalf.)

Q. Well, what became of the—this report of Mr. Ehrendreich's, Defendant's Exhibit C, shows fifty-four checks were issued on this fund—do you know where those checks are? A. No, I do not.

Q. Does anybody know?

A. They were searched for but were unable to find.

Q. Well, where would they be put? What has happened to them?

A. When the office was moved from the Federal Building to the new Territorial Building, the books and everything was packed up in separate boxes and taken over to the new building and opened over there, and they might have been misplaced in the move.

Q. You were there at the time of the move, weren't you? A. No, I was not. [273]

Q. Oh, you were not there? A. No, sir.

Q. But did you ever look there for them?

A. No; I never had an occasion to look for them.

Q. Did you ever look for the bank statements?

A. I looked for the checks, but they had been reported to me that they had been looked for before and were unable to find.

Q. And they were not in the Treasurer's Office? You looked there?

A. They weren't in the Treasurer's Office.

Q. And you didn't look for the bank statements?

A. No, I didn't.

Q. Did you ever examine the ledger sheets at the bank? A. No.

(Testimony of Frank A. Metcalf.)

Q. So that, as a matter of fact, this account was set up just exactly as the check showed, wasn't it—Chilkoot Ferry by Robert E. Coughlin?

A. Yes.

Q. And those checks have all disappeared except the one that Steve Homer had, which was not cashed; is that right?

A. I can't account for it at all.

Q. All right. Now, you said here this morning something about your reason for setting up this ferry fund in the [274] way you did, and you said, I think, that the Territory purchased the ferry in the spring of 1951, June of 1951, and what was your reason for not putting the operating revenue in the Motor Fuel Tax Fund? What did you say that was?

A. I didn't quite get the question.

Q. Well, you had this Motor Fuel Tax Fund in your charge, didn't you?      A. Yes.

Q. That was a special fund that was paid over to your department, the Highway Engineer?

A. Yes.

Q. Now, what goes into that fund?

A. Receipts from motor—from gasoline sales.

Q. What else?      A. Motor fuel sales.

Q. What else goes into it?

A. 2% of the total sales.

Q. Well, is that all?

A. Well, there was the returns from licenses, drivers' licenses. That went in there, too.

Q. Did you have any fines on the highway?

A. No; no fines.

(Testimony of Frank A. Metcalf.)

Q. But the licenses do go in?

A. Just the drivers' licenses only; yes. [275]

Q. And, then, that fund comes from all over the Territory? A. Yes.

Q. All the divisions; and it is all put in one general fund? A. Yes.

Q. That is right. Now, when you spend money out of that fund, you don't spend it in any particular proportion, do you?

A. Well, it was aimed to be done that way.

Q. Yes; but it is never done very accurately that way, is it?

A. Well, it is left entirely to the judgment of the Engineer.

Q. Your office report for 1951 and '52 will show in what divisions you expended monies?

A. Yes.

Q. And for what purpose; is that right?

A. Yes.

Mr. Nesbett: Now, your Honor, not to try and stop anything that might be material, but it seems as though we are digressing again, and I can't see any relevancy whatsoever in going into this matter.

The Court: It is not proper cross-examination either, is it, counsel?

Mr. Faulkner: The witness has told us why he set up this ferry fund, why he set it up, went into great length. Now, I want to cross-examine him a little bit on that—why he couldn't do it as the law requires. [276]

The Court: Well, possibly. You may proceed.

(Testimony of Frank A. Metcalf.)

Mr. Nesbett: What does that have to do, your Honor, with what he did in the way of disbursing these taxes?

The Court: The point raised by counsel is that he was asked concerning why he set up this fund, and he has the right to cross-examine on that point, and we cannot preclude him from doing so—if that is the purpose of your cross-examination.

Mr. Faulkner: I don't quite understand what the witness was driving at this morning, and I want to try to clarify it. I don't believe the jury does.

Q. (By Mr. Faulkner): Mr. Metcalf, you said that you didn't want to pay the operating expenses of the ferry out of this Motor Fuel Tax Fund, which is in your charge; is that right?

A. Yes. I realized that it was more than percentage would allow.

Q. Well, what percentage?

A. Percentage of the amount received.

Q. Well, what were those payments for? I might, perhaps at this point, I might ask if this is your report for the year 1951 and '52 as Highway Engineer? A. Yes.

Mr. Faulkner: We will offer that in evidence.

The Court: For what purpose, counsel? [277]

Mr. Faulkner: I want to question him about this fund and why it was that he had to set it up that way.

Mr. Nesbett: It would only be confusing to the jury, your Honor, and it has no relevancy so far.

(Testimony of Frank A. Metcalf.)

The Court: It is not for the purpose of impeachment in any way?

Mr. Faulkner: Oh, no. I am cross-examining him on it. I want to find out what—I want to get this clear as to why they set up this fund, and I want to show the figures in this report.

The Court: Well, is the fund mentioned in the report, this Chilkoot Ferry Fund, mentioned in the report?

Mr. Faulkner: Yes, sir; yes.

The Court: Oh, it is. Very well. For that purpose then it may be admitted.

Mr. Faulkner: All right. I will offer this in evidence as Defendant's Exhibit D.

The Clerk: The exhibit is so marked.

Q. (By Mr. Faulkner): Mr. Metcalf, in connection with your testimony this morning I notice that you said that you didn't want to use the Motor Fuel Tax money in connection with the operation of the Chilkoot; is that right? A. Yes.

Q. Now, in your report here for 1951 and '52 on Page 11 shows operating revenue of the Chilkoot \$32,746.12, and on Page [278] 13 of the report you have under the heading "Expenditures on Roads, Harbor and Water Facilities," "Chilkoot Ferry gross expenditures \$140,505.58." Now, I want to ask you this. Where did the remainder of that item of expenditures come from? You have there receipts of thirty-two thousand something—I think I have it correct—and expenditures of one hundred and

(Testimony of Frank A. Metcalf.)

forty thousand. Now—yes, \$32,746—now, where did that remainder come from?

A. Well, that was due partly to the improvements that we had to make on the boat, and that improvement came out of the Motor Fuel Tax.

Q. And I suppose you have the purchase price there somewheres?

A. We had to take it from the Motor Fuel Tax in order to repair the boat.

Q. So that all this amount, this difference between one hundred and forty thousand, five hundred, and thirty-two thousand, seven hundred, did come out of the Motor Fuel Tax Fund?

A. It did; yes.

Q. Now, Mr. Metcalf, there wasn't very much money earned by the Chilkoot Ferry in that time, was there? Does that represent, that figure I read you, that thirty-two thousand, seven hundred and forty-six, represent the total earnings? [279]

A. No. We had to make extensive repairs on the boat in order to meet the requirements of the Coast Guard. In fact we had to put on a whole new bottom and other repairs besides.

Q. Now, do you know anything about the method that Mr. Coughlin had of handling the funds with reference to payment of expenses, in paying the expenses of, for instance, the board of the crew, the wages of the crew; do you know what method he used there?

A. No; except on one or two instances He wrote himself a check and took the money and used that



(Testimony of Frank A. Metcalf.)

and paid off his men in cash. That happened to happen in two or three instances, but I don't know as that was his general method.

Q. In a good many instances he handled cash?

A. Sometimes.

Q. And you don't know today just exactly how the fund stands, do you?      A. No, I don't.

Q. Do you know when the fund was closed at Behrends Bank?

A. No; I don't know that it was closed entirely.

Q. Well, when Mr. Moore said that he and John Dimond went down there and told them to close it or something, do you know what was done with it?

A. No, I don't. [280]

Q. Well, do you know how the expenses were handled after that? That, I think, was August 25, 1952.

A. The suspension of the operations took place very shortly after that.

Q. After August 25th?      A. Yes.

Q. Well, Mr. Ehrendreich's report shows you made several voyages after that?      A. Yes.

Q. How did you account for the funds then, after that, after it was frozen or turned over to the Treasurer or whatever was done with it?

A. That was done entirely through the purser.

Q. Well, you mean, then the purser handled these funds in cash?      A. Yes.

Q. For instance, if the agent at Haines would send him down some checks, freight money and

(Testimony of Frank A. Metcalf.)

passenger money, made payable to the Chilkoot Ferry, what would become of them?

A. The cash was used as payment of running expenses at the time.

Q. And he would cash these checks?

A. Yes.

Q. And do you know where he kept the cash?

A. No; except in the bank. [281]

Q. What bank? A. B. M. Behrends Bank.

Q. Well, but this account, this particular account had been closed August 25th, as the testimony shows; isn't that right?

A. I don't know that it was closed.

Q. You don't know that it was closed? Did you ever look at the ledger sheets there? A. No.

Q. You didn't even make any effort to bring those with you? A. No.

Q. Now, when Mr. Daum came to you to inquire about the minutes of the Board of Road Commissioners, where you set up, authorized the setting up, of this fund, putting the funds in the hands of Mr. Coughlin, you gave him a copy of the minutes, did you?

A. I didn't give him a copy. I let him copy it at my desk.

Q. You let him read it?

A. I let him read it, and then I think he took some notes on it.

Q. And did you explain it to him quite thoroughly? A. Yes.

Q. Your reasons for doing that? A. Yes.

(Testimony of Frank A. Metcalf.)

Q. And he published that, didn't he?

A. Not the way they were given to him. [282]

Q. Well, of course he doesn't get your exact language; no reporter ever does unless he—unless you write it out for him.

Mr. Nesbett: Well, your Honor, I don't know—that isn't proper to talk that way. You are supposed to ask questions; that is the only method of cross-examination.

The Court: The objection is sustained.

Mr. Faulkner: All right. Pardon me, your Honor.

The Court: Yes.

Q. (By Mr. Faulkner): Mr. Metcalf, when Mr. Daum published these articles in the paper that are complained of, he gives under one headline here, "Roden, Metcalf Say 'Nothing Crooked' Here," with your picture, a very good picture of you; isn't that substantially correct? You said the Board decided to pay \$30,000.00 for the boat; isn't that right? A. In the neighborhood of that.

Q. And you directed the setting up of this fund, didn't you? A. Yes.

Q. And told him how the ferry was to be operated? A. Yes.

Q. And the language he uses here is substantially your language, isn't it? A. No.

Q. What was it that isn't your language? You said, I think, [283] that you didn't say that it was a bookkeeping trick? A. No.

Mr. Nesbett: I ask that the witness be shown the

(Testimony of Frank A. Metcalf.)

exhibit if he is going to have to state what language in the article is not his own.

Mr. Faulkner: I was just asking him a couple of questions, and I will——

The Court: I think it is proper cross-examination.

Q. (By Mr. Faulkner): You said, I think, in answer to Mr. Nesbett's question, that you did not say that this was set up as a bookkeeping trick?

A. No, I did not.

Q. Now, do you know whether Mr. Daum took any notes of your conversation? Did he do any writing there?

A. I think he did, but I am not sure.

Q. And you said here—I don't think this was asked you, if in the article you said the repairs amounted to \$29,000; is that substantially correct?

A. Repairs to the boat?

Q. Yes.

A. In the neighborhood of that. I don't know the exact amount.

Mr. Faulkner: If the Court will pardon me just a minute.

Q. (By Mr. Faulkner): And I ask again, Mr. Metcalf, you [284] don't know exactly when Mr. Ehrendreich was asked to keep track of these accounts?

A. Yes. I don't know the exact date but I know it was early in '52.

Q. What authority did he have with reference to the account, if any? A. What authority?

Q. Yes. A. He was given the books.

(Testimony of Frank A. Metcalf.)

Q. To keep the books? A. Yes.

Q. And he had nothing to do with issuing the checks, though, or disbursements? A. No.

Q. And, as a matter of fact, don't you think that occurred sometime after, you got him to keep books sometime after you had him make this audit October 10, 1952?

A. There were none prior to that.

Q. Well, if Mr. Ehrendreich says that he comes into this thing then, at that time, would that be correct or not?

A. He came into it when he set up this set of books for me.

Q. When was that?

A. That was soon after June 5th.

Q. And that was some time, quite a while then, before he made the audit? [285] A. Yes.

Q. Well, just what was the purpose of getting these audits from him? He was keeping the books, was he? A. Yes.

Q. And you don't know why you had these two audits made October 10, 1952?

A. Well, it was near the close of the season, and I had my Biennial report to get out.

Q. Well, I mean, but why did you have two made? You don't know that, you said.

A. No, I don't know why there was two made.

Q. Mr. Metcalf, I might ask you this question: Do you—you didn't get along very well with Mr. Moore, did you?

A. Not later in the term, I didn't.

(Testimony of Frank A. Metcalf.)

Q. Well, for quite a long time you didn't; you didn't like him, did you?

A. Oh, I got along with him, yes, but——

Q. Well, did you——

Mr. Nesbett: Let him answer.

Mr. Faulkner: All right.

A. I wasn't particularly friendly with him.

Q. (By Mr. Faulkner): No. Didn't you feel that he was a little too strict when it came to public accounts?

A. No. I thought he took his, the impression to me was, he took his job too much to heart. [286]

Q. Too serious? A. Too serious.

Q. And you remember the incident he told about where he held up a check on a voucher of yours for five dollars? A. Yes.

Q. Something in connection with Dewey?

A. Yes.

Q. And those things you didn't like? Where he was very particular about accounts, you didn't like that?

A. When Frank Boyle was Auditor, he used to come down quite often to my office. I was on the first, and he was up on the third floor. Later on when he became Auditor, we held the same position; that is, we were drawing the same salary from the Territory; he called me up and asked me to come up to his office; he wanted to see me. Well, it struck me kind of funny. I said, "Did it occur to you it is just as far from your office to mine as it is from

(Testimony of Frank A. Metcalf.)

mine to yours? Why don't you come down here?"

That is the last I heard about it.

Q. That was when, Frank?

A. That was——

Q. Approximately? A. Oh, late in 1952.

Q. In '52? A. Yes. [287]

Q. You say when he became Auditor?

A. Yes; after he became Auditor.

Q. Well, didn't he become Auditor in 1950?

A. Yes.

Q. Well, wasn't it then?

A. No. It was some time after.

Q. Oh, it was after then. Oh, I see. Excuse me. I misunderstood you. Mr. Moore was in the office quite a long time before Mr. Boyle died?

A. Yes. He was Mr. Boyle's assistant.

Mr. Faulkner: I think that is all. Thank you.

### Cross-Examination

By Mr. Nesbett:

Q. Mr. Metcalf, what was this incident in connection with a five-dollar voucher and Governor Dewey? We might as well bring it out.

A. Well, Governor Dewey made a trip to the Territory, and, as chief of the Highway Patrol, I had two of my patrolmen with their cars out to meet them. The Governor was there in his car, and he asked that the patrolmen act as guides or go with him as they went around the glacier. Well, I said, "In that case I will take the baggage to the hotel." There was more baggage than what would fill my

(Testimony of Frank A. Metcalf.)

car, so I commandeered a taxi and asked him [288] if he would help me take this to the hotel.

Q. Was that Governor Dewey's baggage?

A. Governor Dewey's baggage and that of his party. And so when we got to the hotel he charged me five dollars for bringing it in, and I said, "Give me a receipt," which he did. I attached that receipt to a voucher and asked for reimbursement, and he wrote a lengthy statement on the account and said it was not the policy of the Democrats to pay the expenses of the Republicans.

Q. Was Governor Dewey Governor of New York at that time?

A. Yes; he was Governor of New York.

Q. And was he the guest of Alaska on that occasion?

A. He was the guest of our Governor at the time.

Q. Who paid that five dollars?           A. I did.

Q. Were you ever reimbursed for the expenditure?

A. Governor Gruening offered to do it, and I said, "It is already taken care of, and let's forget it." I think, if I had written another voucher without explaining what it was, I could have got the five dollars as an expense account.

Q. Mr. Faulkner mentioned your picture in connection with this article entitled "Roden, Metcalf Say 'Nothing Crooked' Here." Your picture appears in the middle of that column. I will ask you whether or not your reaction [289] on seeing your picture in connection with the context of the entire front page made you feel like a potential jailbird or the wanted signs they stick around post offices?



(Testimony of Frank A. Metcalf.)

The Court: That is a rather leading question.

Mr. Faulkner: Yes; I think so, your Honor.

A. It should have had a number on it.

The Court: Will you withdraw that question and rephrase it? Ask him how he felt.

Q. (By Mr. Nesbett): Well, now, regarding this fund and these audits by Mr. Ehrendreich, I will ask you if you were ever contacted by any Territorial official with respect to these audits before you left office on April 1, 1953? A. No.

Q. Did these audits, as presented to you, or at least in your discussions with Mr. Ehrendreich, present any deficiencies that were sharply brought to your attention that needed correction?

A. No, they didn't.

Mr. Kay: May we have just a moment to examine this exhibit? We haven't seen it before.

The Court: Yes.

Q. (By Mr. Nesbett): Mr. Metcalf, at the conclusion of Mr. Ehrendreich's first audit, dated October 10, 1952, and [290] addressed to the "Territorial Board of Road Commissioners, Juneau, Alaska; Gentlemen," and then proceeding through numerous paragraphs, and in particular dealing with the matter of the purser's handling of the funds, there is this wording in Paragraph 3: "From our analysis it appears that the funds the purser can account for exceed the amount he is accountable for by \$434.73. That such an overage exists is further evidenced by the fact that on the following voyages more cash was disbursed for expenses than

(Testimony of Frank A. Metcalf.)

was taken in from revenues and prepayments.” That and the statement to that effect in connection with the last paragraph which reads as follows, just over the signature of Mr. Ehrendreich: “In my opinion, the Purser has satisfactorily accounted for all Territorial funds coming into his custody between June 25, 1951, and Sept. 30, 1952—Voyages #1 to #54, inclusive. Respectfully submitted, C. J. Ehrendreich.” Certainly, that didn’t cause you to have any doubts or qualms about the status of the fund, did it?       A. No.

Q. You mentioned suspension of operation about October 10th. Would you explain to the Court and the jury just what you mean by that, in connection with the ferry?

A. The ferry was supposed to take cars back and forth from one terminus to the other, and early in in the fall the [291] pass over above Haines would be closed with snow, and no two years were the same, anywhere near the same, date, so it depended on the closure of the road when we stopped the operation of the ferry.

Q. What you meant by suspension of operation was when you laid it up for the winter; is that right?       A. Laid it up; yes.

Q. Until you put it in operation the next spring or summer?       A. Yes.

Q. You mentioned also, in response to one of Mr. Faulkner’s questions, in order to satisfy the Coast Guard you had to put an entirely new bottom in that ship?       A. Yes.

(Testimony of Frank A. Metcalf.)

Q. I will ask you whether or not you ran into other inconveniences and expenses in the operation of that ferry by reason of Coast Guard requirements?

The Court: Counsel, aren't we going still so far afield? If you limit this case to the issues, we have plenty to do.

Mr. Nesbett: I think so, too. I will be happy to do that. I know we got off the track rather innocently, but, well, if your Honor feels I shouldn't go any further——

The Court: I can't see any relevancy in such inquiry.

Q. (By Mr. Nesbett): Now, Mr. Metcalf, one or two other questions. When you left office on April 1, 1952, were [292] those canceled checks of the fund in your office? A. Yes.

Q. And you did not go back to the office in any official capacity after that date, did you?

A. No.

Q. Do you have any idea then what your successor might have done with them?

A. No, I don't.

Q. You have no jurisdiction over the checks, have you? A. No.

Mr. Nesbett: That is all, your Honor.

Mr. Faulkner: There is one question I forgot to ask Mr. Metcalf, your Honor, in cross-examination, in the first part of it this morning, with reference to the vote. Counsel asked him the vote of the election. If the Court holds that to be material—I

(Testimony of Frank A. Metcalf.)

didn't object to it. I wanted to ask him if he compared the primary vote with the vote in the election, and I wanted to ask him another question or two about that in order to——

The Court: It is not proper recross.

Mr. Faulkner: No; but it is a question I would like to ask him on cross-examination.

Mr. Nesbett: I have no objection.

The Court: Very well. [293]

#### Recross-Examination

By Mr. Faulkner:

Q. Mr. Metcalf, you spoke about the vote that Mr. Reed got in the primary election as compared with the vote that he got in the election in the fall, and you showed the difference in the number of votes. I will ask you this: In the primary election he was running against another candidate of his own party, wasn't he? A. No.

Q. Wasn't he? A. No.

Q. He had no opposition? And so two or three votes would have nominated him? A. Yes.

Q. Yes. So there was no reason for anybody to vote for him? A. No.

Q. In the fall election he was of course opposed to you? A. Yes.

Mr. Faulkner: I think that is all. Oh, there is one other question on redirect, too.

Q. (By Mr. Faulkner): You said that, about these checks, you said you left them in the office. Did you ever—before you left the office, some six

(Testimony of Frank A. Metcalf.)

months or more, seven months before you left the office, you had brought this suit, hadn't you? [294]

A. Yes.

Q. You had filed this libel suit. Well, did you ever take any steps to see that those checks would be available for this suit or copies of them or some evidence as to what was on these checks, before you left the office?

A. I didn't think they were relevant.

Q. You didn't think they were relevant. Now, here these checks were made out. You didn't make any attempt at all. You don't know today the names of the payees? A. No, I don't.

Q. Or the purposes for which drawn?

A. No, I don't.

Q. And you never, while you were there—you thought those checks belonged in the Highway Engineer's Office or the Treasurer's Office?

A. The Highway Engineer's Office.

Q. You thought they belonged in the Highway Engineer's Office? A. Yes.

Mr. Faulkner: That is all.

### Redirect Examination

By Mr. Nesbett:

Q. Do you mean to say, Mr. Metcalf, that you can't remember the names of the payees and the amounts and the dates on all those checks [295] today? A. No. I didn't write the checks.

Mr. Faulkner: That wasn't the question. The

(Testimony of Frank A. Metcalf.)

question was any of them—did he remember the names of the payees on any of them.

Q. (By Mr. Nesbett): Now, Mr. Metcalf, as a matter of fact, Mr. Faulkner did make a demand upon us to produce those checks, didn't he?

A. Yes.

Q. And you had been out of office since April of '52 at that time, hadn't you? A. Yes.

Q. '53; pardon me. And, nevertheless, you did make an effort to locate those checks, didn't you?

A. Yes, I did; after I got this notice from Mr. Faulkner.

Q. Because he requested them? A. Yes.

Q. Now, with respect to the primary, while Mr. Reed had no opposition, but neither did you have any opposition? A. No.

Q. And the same existed in the general election?

A. The same existed in the general election.

Mr. Nesbett: That is all.

#### Recross-Examination

By Mr. Faulkner:

Q. Weren't you mistaken about that? Didn't Anita Garnick [296] run against him?

A. No, sir. No; she didn't run.

Q. She didn't run? A. No.

Mr. Faulkner: That is all.

The Court: That is all.

(Witness excused.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

HENRY RODEN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Is your full name Henry Roden—R-o-d-e-n?

A. Yes, sir.

Q. How long have you resided in Alaska, Mr. Roden?

A. Oh, pretty nearly fifty-eight years.

Q. And what was your business or occupation when you first came to Alaska?

A. I came to Alaska in the winter of 1897 to '98 and engaged in the business of prospecting and mining, and later on, after having engaged in that line of work for about five [297] or six years and while continuing in it, I studied law, and I believe it was in 1906: possibly 1907, but I think it was 1906, when I was admitted to practice law at Fairbanks, Judge Wickersham being on the bench.

Q. Judge Wickersham? A. Yes.

Q. Was Fairbanks your first city of residence in Alaska, Mr. Roden?

A. No. I had resided on the Yukon River, a short time at Circle City, and in the fall of '98 I

(Testimony of Henry Roden.)

established my home at a town called Rampart in those days. Rampart was an important settlement then on the Yukon River. It has nearly disappeared now. And I didn't go to Fairbanks until about 1904 or '05 and there engaged in mining until I was, as I say, admitted to practice law.

Q. Mr. Roden, do you mind telling me your present age?      A. My present age?

Q. Yes.      A. I am eighty-one years old.

Q. Now, how long did you reside in Fairbanks, Mr. Roden?

A. I resided in Fairbanks—well, let me explain this. A few years after I was admitted to practice law I was appointed Assistant United States Attorney, and, while Fairbanks was my headquarters, I spent a good deal of my time on the Yukon River, and, when the discoveries were [298] made at Iditarod, the chief used to send me down there to attend the term of court which was held at Ruby and over at Iditarod at least once a year, but Fairbanks, of course, was my headquarters until 1912 when I was elected to the Senate of the first Territorial Legislature which met in March, 1913. The first of February, 1913. I resigned my position as Assistant United States Attorney and went to Juneau to attend the first session of the Legislature. After the session was over I returned to the Interior and practiced law until about 1920 when I came to Juneau, settled in Juneau, and engaged in the practice of law in Juneau.



(Testimony of Henry Roden.)

Q. Were you, Mr. Roden, elected to other offices while you resided in Juneau?

A. In 1935 I was elected from this division to the Senate and I served in 1935 and in 1937. I was again elected in 1938 and served in 1939 and 1941. In 1941 I had the honor of being President of the Senate. In 1940 I was elected Attorney General, and my term as Attorney General commenced on April 1, 1941. I served out that term, and then went back to private practice until, I think it was, in May, 1949, when the defalcations of the then Treasurer of the Territory became known, I was appointed to serve out his term. In 1950 I was elected to the office of Treasurer. At that time my Republican friends didn't [299] put up a candidate at all. And I served then until the first of April this year.

Q. As Treasurer?

A. Yes, sir; as Treasurer.

Q. The defalcations of the Treasurer preceding you, when you said that did you have reference to the defalcations or, rather, the fact or embezzlement of funds by Oscar Olson?

A. I mean the embezzlement of the Territorial funds by Oscar Olson.

Q. Now, Mr. Roden, as Treasurer of the Territory you were automatically a member of the Board known as the Territorial Board of Road Commissioners, were you not?      A. That is right.

Q. And you were a member of that Board and also Treasurer of the Territory of Alaska?

A. Yes.

(Testimony of Henry Roden.)

Q. When that Board purchased the Ferry Chilkoot, were you not? A. Yes.

Q. Can you very briefly—

Mr. Nesbett: Now, your Honor, should I touch on this? I notice you seemed to want a word on it.

The Court: I do not believe that there is any dispute in the evidence about the matter of the purchase of the [300] Chilkoot. It would seem only repetitious and, therefore, may be avoided unless you believe it material.

Mr. Nesbett: Very well, your Honor, I will skip it.

Q. (By Mr. Nesbett): Now, Mr. Roden, after the Territory acquired the Ferry Chilkoot were any inconveniences, with respect to receipt and disbursement of money in connection with the operation of the ferry, experienced?

A. Yes. I made a couple of trips with the ferry myself, and I saw that the way it was being operated then would not do, and, particularly, when the ferry was taken to Seattle—that was in April, if I remember correctly, in 1952—to put a new bottom on it, I happened to be in Seattle, and Bob Coughlin was on the ship of course, and so was Steve Homer. Coughlin was hurt. I don't remember just exactly how it came about, but anyhow he landed in the hospital and was there for probably ten days or two weeks, and I had to step in quite a little and assist Homer to carry on the repairs and to get the boat ready to get her back up here for the 1952 season.

I think she came back about, oh, it must have been

(Testimony of Henry Roden.)

in May, and it was then early in June when we had this meeting of June 5th, which has been referred to here, when it was determined that the receipts from the ferry should be deposited in a fund and that Coughlin as our agent should be the only one who could draw on those funds. [301]

Q. That was, as a matter of fact, your proposal at that meeting, wasn't it?

A. It was my proposal.

Q. And was that proposal and plan carried out?

A. It was.

Q. I will ask you, generally, whether or not that plan succeeded?

A. I think that plan succeeded very well.

Q. Now, I will ask you whether or not the Attorney General was present at that meeting at which this plan was proposed?      A. He was.

Q. Did he offer any objection or make any statement in connection with the legality of the method proposed?      A. I think not.

Q. And do you know how long that method then of handling receipts and disbursements was used by Coughlin and the Board?

A. Practically for the rest of the season, that '52 season.

Q. Do you know whether or not Mr. Coughlin operated that ferry in the seasons subsequent to 1952?

A. Mr. Coughlin operated the ferry all of the year 1953, all of the year 1954 and in the year 1955 up until about the first day of May, when he was

(Testimony of Henry Roden.)

again requested, and had an agreement with the Territory, to operate it for [302] this year also, but declined to do so.

Q. Do you know whether or not Mr. Coughlin, would you know as Treasurer, whether Mr. Coughlin was ever approached with respect to any shortages in the fund with respect to the years 1952 and '53?

A. I am quite sure he was not.

Q. Mr. Roden, do you recognize Plaintiffs' Exhibit No. 1, the front page of the Alaska Juneau Empire? A. I do.

Q. Or, rather, Daily Alaska Empire. Will you please state to the Court and the jury your reaction upon reading the items outlined on that page in connection with the Chilkoot fund and the headline in black type which reads "Bare 'Special' Ferry Fund"?

A. Well, sir, it is pretty difficult to explain how I felt. First I was angry and then I was sad and sorry, because I felt that, after fifty-five years in the Territory and knowing the Empire as I had known it and its operators, I did not deserve that sort of treatment.

Q. I will ask you to look at that headline again. "Bare 'Special' Ferry Fund," is that in your opinion a true and accurate job of setting up a headline in connection with the following context?

A. I would say not.

Q. In what respect is it not? [303]

A. Well, the very word "Bare" would indicate that, so to speak, something has been discovered;

(Testimony of Henry Roden.)

something has been uncovered; something that was hidden; something that the general public couldn't see.

Q. Was that the fact in connection with this fund?           A. No.

Q. Was there anything special about the fund?

A. There was not.

Q. Now, it says as a subheadline "Reeve Raps Graft, Corruption." which subheadline appears immediately above the photostatic copy of a check made payable to Steve Larsson Homer, dated 20 August, in the amount of \$398.04. What was your reaction when you read that and saw the position with respect to the check?

A. Well, there was no truth in the statement. It wasn't true.

Q. Did you read the article which goes with the headline "Reeve Raps Graft, Corruption" with a picture of Bob Reeve; you did, didn't you?

A. Oh, I read it; yes.

Q. Does that article mention the Chilkoot fund in any respect?           A. No.

Q. Or this check?           A. No. [304]

Q. Is it then in your opinion, just considering the position of the headline and the check, is it the type reporting that would convey the right impression to a reader with respect to the fund or Reeve's activities and the check?

A. Well, I think the position of the check was intended to influence the reader and to indicate that there was something wrong somewhere.

(Testimony of Henry Roden.)

Q. The subheadline to the feature article reads in rather large type "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account." Is that a true and accurate job of reporting?

A. We did not divert any money to any private bank account.

Q. Is there any such thing, I will ask you, as a public bank account?

A. Well, that may be a hard question to answer. As far as the Territory was concerned, we had an account in every bank in the Territory.

Q. Well, are those banks all private banks? Were they not?

A. Some of them are private banks; some of them are—yes, they were private banks, every one of them.

Q. Even though they might be national banks?

A. They might be national banks but they are still owned by private parties.

Q. They are owned by private citizens? Are they not?  
A. Yes. [305]

Q. In the feature article, Paragraph 2, there is this wording, Mr. Roden, "Into it," referring to the fund, "have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged." Is that a true and accurate statement of the fact?

A. No; that is incorrect.

(Testimony of Henry Roden.)

Q. And will you explain briefly why you think it is incorrect?

A. The money was put in this fund for a public purpose. It was put into the fund as a legal proposition, a proposition supported by the Attorney General, and I myself had given the matter considerable study from the legal standpoint, and we had a perfect right to create this fund and put a certain sum of money into it coming from a certain source.

Q. Then is that statement in effect false?

A. It is false; yes.

Q. Under the subheading of that paragraph in rather bold type, rather, the subheading "Illegal Payments," there is this wording: "The 'special fund,' which dates back to early last year, is in the B. M. Behrends Bank" and so forth. Is that a false statement?

A. Well, it is incorrect as to the date. [306]

Q. In what respect?

A. This happened a year later than the article says there.

Q. "Early last year" would refer naturally to—

A. 1951; early in 1951.

Q. The Territory did not even own the ferry then?

A. No.

Q. Then it is in your opinion an inaccurate report?

A. Certainly.

Q. Mr. Roden, in that same article there the fund is referred to in Paragraph 3: "After learning of the unauthorized account late last month, Auditor

(Testimony of Henry Roden.)

Moore and Assistant Attorney General, John Diamond" and so forth. Is that an unauthorized account in your opinion?      A. No, sir.

Q. And is the phrase "the unauthorized account" true or false in your opinion?

A. Incorrect.

Q. And then the next paragraph following: "The case," it reads as follows, "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." What was your reaction when you read that paragraph, Mr. Roden?

A. Well, as it indicates that, if our action followed very [307] closely, we were practically accused of doing the same thing which Oscar Olson did, namely, stealing the money from the Territory, actual stealing of the money that belonged to the Territory.

Q. Did the words "closely parallels" cause you to form that opinion?

A. Well, for all practical purposes the reader would say, "Well, they stole the money," if it closely parallels with Oscar Olson, practically the same, closely the same, almost the same.

Q. As a matter of fact, you succeeded Mr. Oscar Olson as Treasurer; you were appointed to do so, were you not?      A. Yes, sir.

Q. Do you know the method by which Oscar Olson accomplished his defalcations?



(Testimony of Henry Roden.)

A. In a general way I do; yes.

Q. Did the method used by Oscar Olson closely parallel in any fashion the acts that you, as a member of the Board of Road Commissioners, had done?

A. Not at all.

Q. In any respect?           A. In no respect.

Q. You had occasion to go over the defalcations in the office immediately after he left, did you not?

A. Yes. As I say, in a general way. I didn't go into any [308] details. I know what he did.

Q. The phrase in that same column, which is the inside column of the feature article, refers to the action of the Board as "side-tracking the money." Do you consider that, or rather, is that a true and accurate report of the action of the Board?

A. It is not true.

Q. In what respect, sir?

A. We did not side-track any money.

Q. Now, Mr. Roden, in a subsequent paragraph in the same inside column of the feature article the meeting of the Board at which this ferry fund was set up is given as June 6, 1951; is that accurate?

A. No.

Q. What was the date?

A. It was in June, 1952.

Q. Then the statement is inaccurate by one year; is it not?           A. Yes.

Q. In a subsequent paragraph it refers to the actions of the Board as allowing the money to be handled without the knowledge or approval of the Auditor. Is that accurate reporting?

(Testimony of Henry Roden.)

A. The Auditor must have known of it.

Q. Why?

A. Because up to a certain time he had paid all the bills [309] through the road fund, as we call it, or the gas tax fund, and all at once it ceased, this method ceased. As the "watchdog" of the Treasury, as the Empire calls him, he must have observed that.

Q. Mr. Roden, in the last paragraph it says the fund was opened in the name of "Robert E. Coughlin." Is that statement correct?      A. No.

Q. Why not?

A. It was opened in the name of "Chilkoot Ferry by Robert E. Coughlin."

Q. Now, have you read this article, or rather, this editorial, which was also placed on the front page, entitled "Start Talking, Boys"?

A. Yes; I have read it.

Q. What was your reaction on reading that editorial, sir?

A. Well, that expression, "Start Talking, Boys," reminded me, when I saw the United States Marshal taking out the prisoners here yesterday, saying, "Come on, boys." That is the way to address, apparently, the criminals or at least people who are accused of having committed a crime, and that is the impression I got then.

Q. Did the fact that, in what should have been a dignified editorial, the Empire referred to three of the highest officials of the Territory as "Boys"

(Testimony of Henry Roden.)

strike you as a [310] fair report or comment on the given situation?      A. I would not think so.

Q. In that editorial the statement is used that "the money," referring to the fund, "which should have gone into the general fund." Is that accurate, Mr. Roden?      A. No.

Q. Why?

A. The Attorney General was of the opinion that it was not necessary that it go into the general fund, and that was my opinion also.

Q. Your opinion was based upon a section of the Code dealing with the matter of monies received from licenses, taxes, fees, and other monies; was it not?

A. Other monies; yes; as it was fully explained in the communication by the Attorney General.

Q. In a rather lengthy opinion?

A. In a rather lengthy opinion given long before this transaction took place. I think that was given in December, 1951.

Q. That editorial also refers to the checks on the fund as being, the only name on the checks as being that of Robert E. Coughlin. Is that strictly correct and accurate?      A. No.

Q. In what respect? [311]

A. The checks are all signed "Chilkoot Ferry by Robert E. Coughlin."

Q. Do you ever recall that the Empire printed an editorial on the front page of the paper?

A. I won't be positive about that. They may

(Testimony of Henry Roden.)

have done it. I don't know. I don't recall the occasion.

Q. In the next to the last paragraph of the editorial it reads as follows: "But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught." Is that, Mr. Roden, a fair comment and accurate in respect to the situation they purported to deal with or comment on?

A. No. I think that expression, "not be caught," is false. There is nothing to it. There was nothing to be caught for.

Q. Do you have any comment to make on the phrase that the three members, Gruening, Roden and Metcalf, are going to have to stand on their feet and explain to Alaskans?

A. Well, as far as that is concerned, we have nothing to explain. Everything was self-evident and could be easily investigated.

Q. Now, with respect to the last paragraph: "Oscar Olson [312] sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings." Is that, sir, strictly accurate or anywhere near accurate as a comment on the facts?

A. Oscar Olson sat in the prison cell because he stole the Territory's money. It doesn't matter what he thought. That is what he was in prison for.

(Testimony of Henry Roden.)

Q. Does it have any connection whatsoever with the acts they were purporting to report or inform the public of?

A. No similarity between the transactions at all.

Q. Mr. Roden, as a member of the Territorial Board of Road Commissioners, were you ever informed that there was any shortage in the monies handled by Robert E. Coughlin?

A. Well, there was a report came out at one time, and I talked that over somewhat with the Attorney General in the most casual manner. I was never asked about it at all or advised of anything definite.

Q. Were you, as a member of the Board, asked to take any action in connection with any shortage?

A. No, sir.

Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage.

Q. Now, Mr. Coughlin continued to operate the ferry for a number of years after this publication, did he not? [313]

A. If there had been any shortage—Coughlin continued to operate the ferry after Frank Metcalf went out of office and the new Highway Engineer came into office, which happened on April 1, 1933, and Coughlin operated the ferry for the entire balance of the year, that is, from April, 1933, to—

Q. 1953?

The Court: You said 1933. You meant 1953?

A. Yes, your Honor; 1953. When the Territory

(Testimony of Henry Roden.)

paid him thousands of dollars for his time. Coughlin operated the ferry through the entire year of 1954, and the Territory paid him thousands of dollars for his time, and Coughlin operated and was in control of the ferry until just about the first day of May this year when he again was requested by the Territory to operate the ferry for this year, and he said, "No. I don't want to operate it any more." If he had owed anything, surely, the watchdog of the Territory wouldn't have paid him thousands upon thousands of dollars.

Q. Mr. Roden, did you suffer any humiliation after you read this edition of the Empire of September 25th? A. Well, in a way I did; yes.

Q. Well, will you explain it just briefly so that the Court and the jury will understand?

A. Well, I am getting to be an old man, and, as I said [314] before, after being in the Territory at that time 55-56 years, and I did know that I had built up a pretty good reputation, it was humiliating at least to an extent, and that is the way I felt about it.

Q. I will ask you whether or not it worried you that the publication was made and circulated all around the Territory and outside the Territory?

A. Well, to be frank about it, it didn't worry me very much; no. I knew my friends wouldn't believe it, and of course those people, who didn't know me, they might form an opinion of course, naturally would, I suppose.

Q. Can you state whether or not in your opinion

(Testimony of Henry Roden.)

your reputation in Alaska then has been damaged by this publication?       A. I presume it has.

Q. Why do you say that, sir?

A. Well, you couldn't come to any other conclusion. If you say a man is a thief, it certainly doesn't enhance his reputation.

Q. You had no newspaper to print a denial, did you, and give it the same circulation?       A. No.

Mr. Nesbett: No further questions.

Cross-Examination

By Mr. Faulkner:

Q. Mr. Roden, you know now there was a shortage, don't you? [315]

A. No; there isn't a shortage, Mr. Faulkner; there can't be.

Q. What is that?

A. There can't be no shortage.

Q. How is that?

A. The Territory surely wouldn't pay Bob Coughlin thousands of dollars for running the ferry if he owed the Territory anything.

Q. That wasn't the question. If funds were received and no account made of their being received and they were spent by somebody else or lost on the street, there could be a shortage, couldn't there?

A. According to the last audit made on March 15, 1953, by the Arthur Anderson Company, I presume they had all the checks and all the records

(Testimony of Henry Roden.)

present. At that time they said it was three hundred and some cents short.

Q. Three hundred dollars?

A. I think it was three hundred dollars and some cents long. That is the way that report reads, long not short.

Q. We have the report. But, after this account was closed in the bank, how were the funds handled then?

A. I don't know; the account never was closed.

Q. Are you sure of that?

A. I told them not to close it.

Q. That Chilkoot Ferry account by Robert E. Coughlin was not closed? [316]

A. I told them not to close it. That is what I said.

Q. Did you ever look at the bank ledger sheets?

A. No.

Q. Did you check into that before you came down here? A. No.

Q. So you are not sure then whether it was closed or wasn't closed?

A. I am not positive whether the bank carried out my instructions to them.

Q. Now, how was this fund handled after Neil Moore went to the bank and told them to stop the payments out of the account?

A. The end of the season had come, and the Highway Engineer made another application to the Attorney General for his opinion, and the Attorney General repeated again that the special account was



(Testimony of Henry Roden.)

perfectly legal and could be paid out by the parties who put the money into it. That was the opinion again of the Attorney General the second time.

Q. Now, let me ask you this. Isn't the Attorney General, you are talking of, Mr. Williams?

A. Yes.

Q. Didn't the Attorney General in October or September—I don't know the exact date but right after this publication—write an opinion in which he said that the funds [317] should be sent to the Treasurer and then sent to the Motor Fuel Tax Fund and paid out of there?

A. No, he didn't.

Q. He did not do that? A. No.

Q. He didn't do that?

A. I know that opinion.

Q. Well, it was published, wasn't it?

A. I beg your pardon?

Q. It was published in the papers?

A. I don't know whether it was published or not.

Q. Well, then, that is the way it was handled after that, wasn't it?

A. I don't know. I presume so; yes.

Q. So that, if Coughlin continued on, he was continuing on under a different arrangement when he continued on to operate the ferry?

A. Well, all right, let's say he did; yes.

Q. Now, when you set up this special account, did you put him under bond? Did he ever give a bond to the Territory?

A. It wasn't necessary to put him under bond.

(Testimony of Henry Roden.)

Q. It wasn't necessary? A. No.

Q. Now, you said that this fund, that there is nothing secret about it. Was any publicity—did the general [318] public know anything about that fund, or did they have any way of knowing about it?

A. Well, there were plenty of checks drawn against it. I guess every business man in South-eastern Alaska knew about it, between Yakutat and Ketchikan.

Q. Well, did they know what it was and how it came about, is what I mean? Did they have any means of knowing that? A. Yes.

Q. How?

A. All they had to do was go and ask about it and find out.

Q. I know; but, without asking about it, was the public generally informed of what happened, until the Empire came out with it in the paper?

A. The public wouldn't be informed about any fund that belonged to the Territory.

Q. And there is nothing much in the Highway Engineer's Report giving any information, is there?

A. I don't know what is in the Highway Engineer's Report.

Q. Well, there is no mention of it at all.

A. Well, apparently; you read from it this afternoon.

Q. Well, I mean the way the funds were handled. There is no mention in the Highway Engi-

(Testimony of Henry Roden.)

neer's Report as to the way this ferry fund was handled, so that the public didn't know it?

A. The general public doesn't know yet how any Territorial [319] funds are handled.

Q. Well, don't you think they should?

A. If they want to find out, it is easy to find out; they can ask about it.

Q. Well, the law sets up a method, Henry, doesn't it?

A. Yes; the law sets up a method.

Q. And the law prescribes it should go into the Treasury, where there are Territorial funds?

A. Oh, no; not according to the opinion of the Attorney General, they shouldn't go in.

Q. Well, I know; but you are a lawyer yourself; and the Court is not bound by an opinion of the Attorney General. Doesn't the law prescribe the method by which public funds shall be handled?

A. Certain public funds, yes; but not all public funds.

Q. Well, but it says any public money or any money in which the Territory, or any funds in which the Territory or any county, municipality or subdivision has an interest? A. No.

Q. Wouldn't that be public funds?

A. No. They need not go into the general fund, Mr. Faulkner. You are a lawyer also, and you know it.

Q. No; I didn't say the general fund. I mean to the Treasury. A. No. [320]

Q. It doesn't say that?

(Testimony of Henry Roden.)

Q. It wasn't necessary? A. No.

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Q. No; I didn't say the general fund. I mean to the Treasury. A. No. [320]

Q. It doesn't say that?

(Testimony of Henry Roden.)

A. No. It happens every day.

Q. That it must be paid over to the Treasury?

A. Transactions that don't go through the Treasurer's Office happen every day pretty near.

Q. What is that?

A. Transactions where money is taken in by a public officer don't go through the Treasurer's Department at all.

Q. What is that?

A. What is that? Well, I will give you an example. For example, a delinquent father who has a child in a foster home, the Department of Welfare goes after him and says, "Here, you have got to pay that foster home, say, fifty dollars a month." Well, he hums and haws around for a while and he says, "I will pay you that fifty dollars but I won't pay it to the foster home." And the Welfare Department, they accept fifty dollars, and the Treasurer never knows it, and turns it over to the foster home. I will give you another illustration if you want me to. A man dies, and there is no money in his estate, and under the Social Security Law the Federal Government pays for the funeral. The Federal Government pays for the funeral to the parties who pay for it. The undertaker has no money to bury the man, and he says, "I must have money to buy the coffin." All right; so the Welfare Department [321] goes and says, "All right. We will pay you; we will pay the man that paid for the funeral," and then, when the money comes from the Federal Government, it doesn't go through the

(Testimony of Henry Roden.)

Treasurer's Office; it goes directly to the people to whom the Welfare Department advanced the money.

Q. Well, that is not hardly in the nature of public funds that—

A. It is in the same way it was with the ferry fund; it was not public money in the sense that it had to go through the Treasurer's Office.

Q. Of course this is more or less argument. What authority did the Board of Road Commissioners have in the first place to purchase the Chil-koot Ferry and to operate it?

Mr. Nesbett: Now, your Honor, I didn't go into that.

The Court: I had understood that there was no question about the authority of the Board to purchase this ferry.

Mr. Faulkner: Oh, yes, there is. There is no law in the Territory that authorizes that.

The Court: It was admitted in the pleadings, wasn't it, counsel?

Mr. Faulkner: They purchased it, yes; but under what authority? How did they do it? How did they set up this fund?

The Court: May I see the complaint here?

Mr. Faulkner: I think the fact that they purchased it [322] is admitted, your Honor, but I don't think the authority—

The Court: I think the fact that it was legally purchased is admitted.

Mr. Faulkner: I don't think so, your Honor. I might be mistaken.

(Testimony of Henry Roden.)

The Court: Just a moment. Paragraph IV of the amended complaint of the plaintiffs—the same is true in each case—recites—that before the commission of acts by defendant hereinafter complained of the said Frank Metcalf, Gruening, and so on, comprising the Board of Territorial Road Commissioners, purchased and acquired for and on behalf of the Territory the Motor Vessel Chilkoot and caused the same to be operated upon the waters of Southeastern Alaska.

Mr. Faulkner: I think we admit that.

The Court: O.K.; fine—for the transportation of passengers and carrying freight—purchased and acquired for and on behalf of the Territory—and caused to be operated—in order to operate the vessel it became necessary to employ seafaring men, and so on. The costs and expenses thus incurred were paid in part by the Board out of revenues earned from the vessel.

That is admitted in your answer.

Mr. Faulkner: That is right, but it is not admitted that they had any legal authority to purchase it, because they didn't. [323]

The Court: Well, this is the first time that the Court has been aware that there is any such issue as to the legal authority to purchase it, and we will hold it is not relevant here. This case involves not the purchase of any vessel but it involves the operation of the vessel, and it certainly is not relevant, and I will sustain objection to that question. We



(Testimony of Henry Roden.)

will get so far afield that no one will know what this case is all about.

Mr. Faulkner: Well, but, your Honor, the thing I am driving at is what are public funds and what are not. Does the Territory have any interest in these funds, or are they just to be handled by some unauthorized person without bond.

The Court: Well, I hold any evidence relating to the purchase of this vessel is not relevant here.

Mr. Faulkner: Well, if the Court rules that—

The Court: Yes, sir.

Mr. Faulkner: I will take an exception to the Court's ruling. Pardon me just a minute, your Honor. I think that is all.

(Whereupon, the trial was adjourned until 10:00 o'clock a.m., November 17, 1955, and resumed as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Before proceeding—Mr. Faulkner, on the matter of the question asked the witness just before [324] adjournment yesterday, to which objection of the plaintiffs was sustained, I did not mean to cut you short on that. It occurred to me, if you desire to be heard on that point and you deem it material, the Court will be glad to hear from you further on it. It occurred to me afterwards that I possibly did not give you an oppor-

tunity to be heard upon it, and, if you care to, we will excuse the jury and take up that matter.

Mr. Faulkner: That was the matter of the legality of the purchase of the ferry?

The Court: Yes. Of course, in this particular instance, there is another objection, which I failed, I think, to state, which I had in mind, that it would not be proper cross-examination because we precluded the plaintiffs from examining the witness on the same subject. However, if you were permitted to go into it, then we would have to permit the plaintiffs to reopen his examination of the witness, but, if you wish to be heard upon it, why, I will be pleased to hear from you further.

Mr. Faulkner: Well, I would like, your Honor, to state my position on it.

The Court: Well, possibly we should excuse the jury then, because it is not the purpose of the Court to exclude either party from anything which is actually relevant here.

Ladies and gentlemen, would you just retire [325] for just a few moments then while we discuss another matter of law?

(Whereupon the jury retired from the courtroom.)

Mr. Faulkner: If the Court please—well, excuse me just a minute. I think I have something here.

This matter came before the Court once before, your Honor, this Court, but the matter was decided on another point, and the Court didn't rule on this particular point. This came up in a libel case, not this kind of libel case, but a libel of a vessel, libel

of the Chilkoot, and the vessel was libeled, and the Attorney General claimed that the vessel was operated by the Territory, owned and operated by the Territory, and therefore not subject to libel.

Well, I had two grounds in opposition to that claim. One was that the vessel was at the time of the seizure chartered; and the other one was that the Territory had no authority to engage in the ferry business, and that is what I would present to the Court very briefly.

Now, the Court under Judge Folta held that, since the ferry was chartered, it was not at that time an instrumentality of the Territory and was subject to libel, and, therefore, our libel action was covered, and that case was later on settled between the Territory and the libelant, so that it never came to actual trial, except the legal points were passed upon there.

Now, the point I wish to make is that our statute on [326] ferries is found in Sections 41-4-1 and 41-4-13 of the Alaska Compiled Laws. Those sections provide that the commissioners, the United States Commissioners, may issue licenses to persons to operate ferries on lakes and rivers. The statute expressly provides that nothing in the statute shall be held to authorize a license—I think that is the way it reads; I am not quite sure; your Honor has the statute there—a license to be issued for the operation of a ferry on an arm of the sea or a bay. So based upon that—then the statute goes on to provide for license fees and regulations for ferries by the United States Commissioners who issue the

licenses, who are permitted to make rates and to change them from time to time, and then the statute concludes with that language, that nothing herein shall be considered to authorize the operation of a ferry on a bay or an arm of the sea. I think that is the exact language.

Now, the Territory at that time argued that this ferry was purchased and operated under the authority of the Board of Road Commissioners because of the statute which gives them the right to build highways and to cooperate with Federal agencies in the building and maintenance of highways, and that statute says also in the building and repair of not only roads but ferries, and there are ferries, as your Honor may know, across rivers where highways extend on both sides of the river. [327]

Now, I argued there and I submit again that this was not or could not be authorized as a link in a highway system, because a ferry operated between Haines and Juneau came from a highway system to a place which was not on the highway system and not connected in any way with it.

The Court: Well, counsel, I dislike to interrupt you, but here is the point we have in mind. Where is there any issue in this case in which the Court may be called upon to hear or determine any question of the legality of the purchase or original operation of this ferry? It is a purely collateral matter; and here is our position. There is only one issue here, and that is the matter arising about this Chilkoot Ferry fund which was set up in June of 1952 sometime after the ferry was purchased

and put into operation, and the question of whether or not the publication is libelous and, especially in this respect, as to whether the publication is true. Now, I find no reference whatever in the publication, which is in issue here, in the Empire as to—relating to the original purchase or the illegality of the operation of the ferry. It is only the illegality of the fund.

Mr. Faulkner: That is right, your Honor; I am not so confident that I am correct about this. I will be frank to tell the Court that it does seem like a collateral issue. The purpose I had in asking this question was to bring out that this ferry was operated without authority of law—it was [328] purchased without authority of law and operated without authority of law, and that the whole arrangement, as the minutes of the meeting say, was to operate this as a private enterprise; the minutes which were introduced here yesterday show that they determined to operate it as a private enterprise. Now, having done that, then they base their authority for setting up this ferry fund on expediency and, as they claim, necessity. Now, that does enter into the case, and it may be purely collateral. I don't like to take up the Court's time with it, and I don't think it is too important, but I tried to get it in for that reason, to show that they purchased it with no authority at all, and, even if they acted under the very best motives, which I am sure they did, in buying it, they then found that, having no authority of law, they had to set this up as a private enterprise and operate it as a private enter-

prise but with public funds, and then they set up this arrangement for having the funds all in the name of someone who was not a Territorial official. Now, that is the point I had, your Honor, but, as I say, I don't like to take too much time, and it isn't too important, but I just felt that that evidence was admissible and then I could argue on it to the jury.

The Court: Well, Mr. Faulkner, to me it isn't too much a matter of time, but the matter of confusing the jury on a collateral issue. If we go into a matter which is purely and wholly collateral, we merely confuse the issues before the [329] jury rather than clarify them, and we would be required to try a matter here which is not before the Court at all.

Mr. Faulkner: I think the issues can be stated and raised here without that, your Honor, and I am very glad to have the Court's ruling on it, because I had thought that it was permissible and I would have had to ask you later on whether it could be used in argument, so, if the Court holds that way, it is quite satisfactory.

The Court: Had there been any mention in the published article, any criticism in the published article, in regard to the original purchase or the illegality of the purchase, then I think it would be in issue here, but I am unable to find any. The article purely related to this operating fund, the Chilkoot Ferry fund. So, I must adhere then to the former ruling—

Mr. Faulkner: Very well. We will not continue to go into that any further.

The Court: —as the evidence is irrelevant. You may call in the jury.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: We will proceed then with the trial of this action. Were you finished with the cross-examination of Mr. Roden?

Mr. Faulkner: Yes. I think Mr. Nesbett wanted to [330] call him again.

The Court: He may be called.

Mr. Nesbett: I had thought I would, prior to Court convening, but I have changed my mind, your Honor. We rest our case in chief.

The Court: The plaintiff rests.

Mr. Faulkner: If the Court please, we can go on with the defense?

The Court: Yes.

### Defendant's Case

Mr. Faulkner: I would like to call Mr. Daum. I think he is downstairs.

The Court: Would you call him then? (Addressing the bailiff.)

Mr. Faulkner: Perhaps, while we are waiting for Mr. Daum, I have some exhibits that I would like to offer, and the first one is a report of Arthur Anderson Company, a portion of a report of Arthur Anderson Company, upon the receipts and disburse-

ments of the ferry for the biennium 1951 and '52. This is a certified copy, certified by the Auditor of the Territory, who has the official records of funds received and——

Mr. Kay: We have no objection.

The Court: The exhibit may be admitted. [331]

Mr. Kay: Your Honor, may I state—I perhaps shouldn't have been so fast—we do object to it on the ground of relevancy; it seems to be totally irrelevant.

The Court: Well, we determined that subject yesterday, and upon the assurance of counsel and the statement that it does cover the period, all of 1951 and 1952—isn't that correct, Mr. Faulkner?

Mr. Faulkner: That is right.

The Court: It may be relevant and may be admitted then.

The Clerk: This will be C.

Mr. Faulkner: C was the Ehrendreich report.

The Clerk: This will be D.

Mr. Faulkner: No. D is the Highway Engineer's Report, printed report.

The Court: Exhibit E then.

The Clerk: I haven't had a chance to straighten these out this morning. Yes; here they are. This is E.

Mr. Faulkner: Next I should like to introduce the certificate of the Treasurer of the Territory, Hugh J. Wade, dated October 26th, under the seal of his office, stating that there are no cancelled checks of the Chilkoot Ferry on file at his office. I want to introduce these, your Honor, to show what effort was made to find these checks. They might



have been in the Auditor's Office or the Treasurer's Office or the [332] Highway Engineer's Office, and I want to show that they are not in any one of those offices.

The Court: The certificate may be admitted in evidence.

The Clerk: Exhibit F.

Mr. Faulkner: The next is a certificate of Irving J. Reed, or Irving Reed, the Highway Engineer, showing that no checks have been found in his office after a search, and this is certified and signed by Mr. Reed and certified—attested to by the Secretary of Alaska.

The Clerk: Exhibit G.

The Court: Any objection?

Mr. Kay: I think both of these are completely irrelevant, but, since they have been passed upon in effect, we have no objection.

The Court: The exhibit may be admitted then.

Mr. Faulkner: We next offer the certificate of John A. McKinney, Director of Finance, who succeeded to the Office of the Auditor, dated October 26, 1955, showing that after diligent search no cancelled checks on the Chilkoot Ferry fund can be found in his office.

Mr. Kay: Same objection.

The Court: The same ruling. It may be admitted.

The Clerk: Defendant's Exhibit H.

Mr. Faulkner: I next offer the certificate of the [333] Highway Engineer, Irving Reed, signed by the Administrative Assistant, Thelma Zenger, that there is no bond of Robert E. Coughlin in connection with the operation of the Chilkoot Ferry on

file in the Office of the Highway Engineer, and this certificate is——

Did I give you a copy of that?

Mr. Kay: No.

Mr. Faulkner: I will. This certificate is attested by the Secretary of Alaska.

Mr. Kay: It is totally irrelevant, and I don't think there was any testimony put in, or that any attempt was made to, that Coughlin was under bond.

The Court: Well, it has been admitted, I think, by Mr. Metcalf.

Mr. Faulkner: No; my recollection is that he said he didn't know.

The Court: That may be true.

Mr. Faulkner: Yes, I think so, your Honor. I might be mistaken about that.

The Court: The relevancy is doubtful, but it may be admitted if you believe it has been.

The Clerk: Defendant's I.

Mr. Faulkner: I next want to introduce on behalf of the defendant——

Mr. Nesbett: Pardon me. I didn't get a copy of "I." [334] What was that please?

Mr. Faulkner: That is the one I just brought you; that there was no bond in the Highway Engineer's Office.

I will next offer a certified copy of the Judgment and Commitment of Oscar G. Olson, certified by the Clerk of this Court.

The Court: I assume there would be no objection?

Mr. Kay: No objection.

The Court: It may be admitted.

The Clerk: Exhibit J.

Mr. Faulkner: Now, if the Court please, I would like to call Mr. Daum.

JACK D. DAUM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Daum, will you please state your name?

A. Jack D. Daum.

Q. Where do you live, Mr. Daum?

A. I live in Anchorage.

Q. And how long have you lived in Anchorage?

A. Since January of last year.

Q. What is your occupation?

A. I am a newspaperman. [335]

The Court: Pardon me. Is that D-a-u-m?

A. Yes, sir.

Q. (By Mr. Faulkner): How long have you been engaged in that work? A. Since 1949.

Q. Where? A. Well, actually——

Q. Where and in what capacity?

A. Well, I have been in newspaper work actually since high school. I was editor of my high school paper, and in the Army I was correspondent for Yank newspaper, and, when I got out of the Army in '45, I worked in Midland, California for the U. S. Gypsum Company in the capacity of cost accountant

(Testimony of Jack D. Daum.)

and I put out a company newspaper there for the employees. That was in '45 and '6. Then in '46 and '7 in the winter I was attending the University of Washington and worked on the student paper there, and in '47 and '48 I was attending the University of Alaska and was editor of the student paper, the Polar Star. Well, in '47 also, prior to entering college, I worked for the Birch, Johnson & Lytle Construction Company as assistant camp manager and published an employee newspaper at Eielson Air Force Base, and in '49 after leaving the University of Alaska I went to work for the Daily News Miner as a reporter. [336]

Q. Where?

A. In Fairbanks; and worked there '49, '50, until January of '51, at which time I was city editor of the News Miner, and in '51 I went out to the Washington, D. C., Times Herald, where I worked as editorial writer for six months and general assignment reporter for a year, until September of '52, at which time I came back to Alaska as reporter for the Daily Alaska Empire, and I left there in June of '53 to return to Fairbanks, and subsequently went to work for the Alaska Railroad as publicity agent.

Q. And is that what you are doing now?

A. I am presently employed at the Alaska Railroad.

Q. About when did you come to work for the Alaska Daily Empire in 1952?

A. About September 9th or 10th of '52.

(Testimony of Jack D. Daum.)

Q. Of 1952. Now, there has been introduced here a newspaper, a copy of the Daily Alaska Empire for September 25, 1952, Plaintiff's Exhibit No. 1, which I will hand you and ask if you are familiar with that paper and with the articles and reports on the first page? A. Yes, sir; I am.

Q. Who wrote the articles with reference to the ferry fund? A. I wrote that story.

Q. And who wrote the editorial on the front page there? A. I wrote that story. [337]

Q. And who wrote the story about Mr. Reeve's speech?

A. Mr. DeArmond wrote that story.

Q. Robert DeArmond?

A. Robert DeArmond; yes, sir.

Q. Was he a reporter at the same time?

A. Yes. He was a stringer for the Empire. He wrote articles for us from time to time. He was what we call a stringer reporter.

Q. Now, when were these articles, appearing in the September 25th issue, written?

A. When were they written, sir?

Q. Yes.

A. On September 24th, the day before the edition appeared.

Q. September 24th. And you reported certain facts there in the article, not in the editorial but in the article, on the right-hand side of the page. Where did you get those facts that you published there?

(Testimony of Jack D. Daum.)

A. Mainly from Mr. Moore, Neil Moore, the Auditor of the Territory, and from Mr.—well, the majority of the information in the lead story on the right side I obtained from Mr. Moore.

Q. Did you make any check anywhere else? Did you go to the bank? A. Yes, sir.

Q. You checked the ferry account? [338]

A. Yes, sir.

Q. At the B. M. Behrends Bank?

A. Yes, sir.

Q. And did you then go to see Mr. Roden and Mr. Metcalf before you published anything?

A. Yes, sir; I did.

Q. And is the article written on the front page of the Empire of September 25th, labeled "Roden, Metcalf Say 'Nothing Crooked' Here," is that a correct report of what they told you?

A. Yes, sir.

Q. And did Mr. Metcalf, if you remember, say at that time that setting up this special ferry fund and handling the money in the way in which it was handled was a trick of bookkeeping?

A. Did you say, did Mr. Metcalf or Mr. Roden say that?

Q. What is that?

A. Mr. Metcalf said that; yes, sir.

Q. Yes; Mr. Metcalf. And you published that in the paper as he said it? A. Yes, sir.

Q. Now, Mr. Daum, in this article on the right-hand page, on the right-hand of the page, you say that "the case closely parallels" the case "of Oscar

(Testimony of Jack D. Daum.)

Olson"; just what did you have in mind in stating that—"in the receipt and [339] disbursement of public funds"?

A. Well, sir, the parallel was very clear and is very clear; that the case of Oscar Olson involved a taking of Territorial monies and putting them into a separate bank account and drawing them out of that bank account unauthorized; this action included the same identical method of handling money in the same unauthorized disbursements and receipt into the fund of monies that should have gone into the general fund, and the withdrawing of monies from that special fund without authorization.

Q. And did you examine the law which you thought at that time was violated?

A. Yes, sir. Mr. Moore showed it to me.

Q. Did you examine Mr. Moore's letter to the Attorney General which you published?

A. Yes, sir.

Q. Calling attention to the parallel?

A. Yes, sir.

Q. And did you believe at the time that these facts were true?           A. I certainly did.

Q. And did you believe that such comment, if there is any comment anywhere, was fair and in accordance with the facts, as a reasonable man?

A. Yes, sir. [340]

Q. Now, Mr. Daum, Mr. Roden, I think, or someone, called attention to the fact that in one place here, perhaps two places, you refer to the year 1951—June 6, 1951—that is where you refer in one place

(Testimony of Jack D. Daum.)

to the minutes of the meeting of the Board of Road Commissioners of June 6, 1951, and perhaps in another place—I don't know; I think that is the only place. How did it happen to be 1951?

A. Well, I understand since then that the meeting was in 1952; and, whether it was a typographical error or whether it was an error in my notes, I don't know.

Q. Anyway, do you think the article shows a basis of 1952?           A. Sir?

Q. I say, the whole purport of the article is that it was 1952?           A. Yes, sir.

Q. And in the article which you published, Mr. Moore's letter, and the facts that he gave you show it to have been the spring of 1952?

A. Yes, sir.

Q. Now, you use the word here, that has been complained of, in the headline "Bare 'Special' Ferry Fund"; now, what did you mean by that; what do you mean by the word "Bare"?

A. Disclose, or making public.

Q. That hadn't been made public or disclosed up to that [341] time?           A. No, sir.

Q. And that is what you meant by that. Now, complaint is also made of the use of the word "Divert." What did you mean by using the word "Divert" the "'Chilkoot' Cash to Private Bank Account"?

A. The word means to take out of the normal channels or to by-pass or to change the direction of. What I meant was that the money, which Mr.



(Testimony of Jack D. Daum.)

Moore and Mr.—the Attorney General—Mr. Williams had said should have gone into the general fund, had been put instead into this private bank account.

Q. And you called that in this article a private bank account?           A. Yes, sir.

Q. What distinction did you make there and why was that distinction made?

A. Well, sir, the private bank as distinguished from the Territorial Treasury.

Q. You were referring to the account?

A. Yes, sir.

Q. As not an account where public funds are kept; is that right?           A. Yes, sir.

Q. Now, Mr. Daum, you published a copy of a check issued to [342] Steve Homer, No. 49, dated August 20, 1952, signed Chilkoot Ferry By Robert E. Coughlin, on the Behrends Bank. Where did you get that check?

A. I believe we obtained it from Mr. Moore, sir.

Q. You think you got it from Mr. Moore?

A. Yes.

Q. Are you sure?

A. No; I am not certain but I am quite—well, I don't know how to say it—I am quite certain but not positive that we obtained it from Mr. Moore.

Q. And Mr. Moore had a number of these checks, did he?           A. Yes, sir.

Q. Now, when you set up these articles, including the editorial, did you know anything about the Reeve report at that time?

(Testimony of Jack D. Daum.)

A. No. At the time I wrote the articles?

Q. Yes.

A. No, sir. That story came in that evening from Mr. DeArmond after Mr. Reeve's speech. Mr. Reeve spoke on September 24th in the evening. And I was writing this story that same evening, setting up my front page for the next day, and Mr. DeArmond was to come in that night and write the story and leave it for me for the following day. I did leave a—I left the left-hand column for the story. [343]

Q. And that is how that happened to be there?

A. Yes, sir.

Q. And who wrote the headlines on the Reeve story; do you know?

A. Yes, sir; I did.

Q. Now, Mr. Daum, who was publisher of the Empire at that time?

A. Mrs. Monsen.

Q. And did you consult Mrs. Monsen about this article or editorial or anything connected with the front page of the paper on that day or that Neil Moore letter?

A. No, I did not, sir.

Q. Prior to publication?

A. No, sir.

Q. Was Mrs. Monsen always able to be there to be consulted about everything that went into the paper?

A. Well, no, I wouldn't say she was. Mrs. Monsen was working more in the capacity of a reporter. She was publisher of the paper, but we only had two reporters and Mrs. Monsen was filling in as a reporter most of the time.

Q. And when did you—did you call this to her attention at any time before it was published?

(Testimony of Jack D. Daum.)

A. No, sir.

Q. Did Mrs. Monsen ever tell you to publish any of these articles or did she ever discuss with you any policy [344] with reference to Governor Gruening? Did she ever lay down for you a policy with reference to Governor Gruening? A. No, sir.

Q. I will ask you this question. It might sound leading. But did she at any time tell you that any particular, that some particular, article should not be put in because it was critical of him?

A. No. Mrs. Monsen never told me what to print or what not to print. The only time that I would hear from Mrs. Monsen would be if something that I had published didn't meet with her approval or if she had comment on it. I can't say that she ever criticized an article except just prior to this story, a few days before, I had written a story concerning Governor Gruening's trip northward, and he had said that it was a road inspection trip, and I pointed out in the story that it was a pre-election trip and that he was to speak at different points along the way, and I put "road inspection" in quotes, having quoted Mr. Gruening, and Mrs. Monsen told me after I had published it that it looked as though I was trying to editorialize a bit on the news and that I shouldn't—that she didn't like it; she didn't like the idea of it.

Q. Now, let's go back to this, to the size of the headlines, Mr. Daum. Was there anything unusual about the size of the headlines of that day. September 25th? [345]

(Testimony of Jack D. Daum.)

A. I don't think so, sir.

Q. Did you frequently use headlines of that size and character?

A. Yes, sir. This is the style of make-up that I had been familiar with on all the papers I had worked. There are different styles of make-up, and I had learned and had been acquainted with the Midwestern style, which is always to use a banner headline and to run the story straight down the page, rather than to break it up in what is called the Hearst style, in splashing large headlines down below the fold and what is called trick make-up, but I preferred and that is the type of make-up I used was a banner headline with a story coming straight down out of it and then subheadlines in relation to the story, more of a straight down style than a splash style.

Q. Now, let's go to the check there and to the headlines about "Reeve Raps Graft, Corruption." The plaintiffs complain they were offended in that because it implied they were meant, and that publication of these headlines and the check on the same page of the paper and the position in which they were published injured them. I will ask you if in your experience as a newspaperman it is very often done, that headlines are published and something is directly under the headlines, to which the headlines do not refer, but the article to which the headlines [346] does refer is on the right or left-hand side? A. Yes, it is.

(Testimony of Jack D. Daum.)

Mr. Kay: I object to the continual leading of the witness.

Mr. Faulkner: Well, Governor Gruening testified to this, and I think that—I don't want to lead the witness, but I just asked his opinion as a newspaperman, if that isn't done. I think that is quite proper.

The Court: I do not find it to be objectionable as leading in view of the fact that the witness is testifying as an expert in the reporting business. He may answer.

Mr. Faulkner: I think he did answer.

A. Yes, sir; that is common newspaper practice.

Q. Mr. Daum, has it come to your attention very recently, a newspaper from the States, which exemplifies what you say?

A. Yes, sir. I just ran across a paper yesterday.

Q. I will hand you this paper and ask you if that method is frequently used for setting up news and headlines on the front page of large daily papers?

A. Yes, sir. This illustrates the same point.

Mr. Faulkner: I will show that to counsel (handing proposed exhibit to plaintiffs' counsel). Any objection?

Mr. Kay: I don't know what it illustrates but——

Mr. Faulkner: I think I would like to show it to [347] the Court. I think the Court should see it (handing proposed exhibit to the Court). It illustrates the method of headlines and articles appearing there which——

(Testimony of Jack D. Daum.)

The Court: I think it may be material for the purpose of illustration here. I would suggest though, it may not be necessary to introduce the whole paper.

Mr. Faulkner: No; just the front page.

The Court: Very well.

Mr. Faulkner: Thank you. That will be Defendant's Exhibit K—isn't it?

The Clerk: Defendant's Exhibit K.

Mr. Faulkner: I would like to show that to the jury at this time in connection with the witness' testimony, if there is no objection. There shouldn't be any. Just pass that along (handing exhibit to the jury).

Q. (By Mr. Faulkner): Now, in the article complained of, Mr. Daum, did either of the plaintiffs say to you that they didn't want the checks on the ferry fund to go through the office of the Auditor or make any reference to the Auditor?

Mr. Kay: I object to that as leading. What did they say?

Q. (By Mr. Faulkner): Well, did either of them say they didn't want the Auditor to see these checks or didn't want to put the account through the Auditor's Office? [348]

A. Yes, sir. That is in my——

Mr. Kay: I object.

The Court: Just a moment. I find that to be leading. It is not cross-examination. He may be asked what these parties—you say, the plaintiffs; you mean the two that he has testified he interviewed?

(Testimony of Jack D. Daum.)

Mr. Faulkner: Yes.

The Court: —what they said with regard to the checks.

Mr. Kay: What if anything.

The Court: If anything.

Mr. Faulkner: Well, the reason, your Honor, I thought it was admissible was that Mr. Roden testified, and I would like to call attention to this particular thing, but I can put the question in that form because it is relevant.

Q. (By Mr. Faulkner): What did they say with reference to this fund and the Auditor's Office?

A. Well, sir, everything they said I have in this article saying "Roden, Metcalf Say 'Nothing Crooked' Here." I went first to Mr. Roden's office after I checked with the bank to make certain that the fund existed and after I checked with Assistant Attorney General Dimond to see that he and Mr. Moore had stopped payment on the fund as Mr. Moore had said. Then I went to see Mr. Roden and asked him what the story was behind this special ferry [349] fund, and he told me substantially as it appears here, going into detail as to the fact the ferry was bought back in May of '51; that there were no appropriations made for operating the ferry; that the Highway fund was being depleted or would have been depleted if it had been used for operating the ferry; and that the money coming in from the ferry couldn't be put in the general fund because it had to be used to operate the

(Testimony of Jack D. Daum.)

ferry, and that, if it had gone in the general fund, they couldn't have got it out to use for operating costs; and that the money had thus been put in this special bank account.

And I asked him if the monies paid out of that special bank account were going through the Auditor, and he said, "No. They can't go through the Auditor." I asked, "Why?" He said that the only thing goes through the Auditor are Territorial vouchers, but he told me to see Mr. Metcalf because Mr. Metcalf was the Highway Engineer and was in charge of this fund, of the Highway fund, so I went down to see Mr. Metcalf. And both Mr. Metcalf and Mr. Roden waved this whole thing aside and said, "There is certainly nothing crooked about this thing. I don't know what you guys are after in this. It is perfectly legal and above board and open to audit at any time." Mr. Metcalf labeled it as just nothing but a trick of bookkeeping, and, well, just substantially [350] what I have in this story. I had to put the two of their stories together because what one omitted the other one included; so, rather than print two stories—Roden said this and Metcalf said this—I put them both together and combined their stories on what happened.

Q. At the time you made up these reports from Mr. Moore and from Mr. Roden and Mr. Metcalf, did you make notes?           A. Yes, sir.

Q. And you wrote up the articles from those notes?

A. Yes, sir. I found the copy, or Mrs. Monsen



(Testimony of Jack D. Daum.)

found my old notes in my desk, which I can if I may——

Q. Well, you don't need to read your notes.

A. No; but if I may refer to them.

Q. Mr. Daum, it was after the article was published, you say, that it was called to Mrs. Monsen's attention?

A. Yes, sir. She saw the paper when it came out.

Q. After the paper appeared. That paper shows, the one that was introduced here in evidence, shows it was issued on Thursday, September 25th. Do you know where Mrs. Helen Monsen was that day?

A. On the 25th, the day it came out?

Q. Yes.

A. Yes, sir. She was covering, that morning or at noon, she was covering the Chamber of Commerce meeting in town. Her story appears on Page 3 of this same edition. [351]

Q. She turned that story in that same day?

A. Yes, sir. She wanted to get it on Page 1, and I told her Page 1 was already made up and back in the shop and I didn't even think I could get her story in the paper that day because I wanted to get out early, and she insisted it be put in the paper, so I did get it in on Page 3 or 5.

Q. At the time she brought it in your stories were already set up?

A. Page 1 was already being set up; yes, sir.

Q. She didn't see it?           A. No, sir.

(Testimony of Jack D. Daum.)

Q. Mr. Daum, when you were working for the Fairbanks News Miner, did you make an investigation of the Palmer Airport matter?

A. Yes, sir.

Q. And you made some reports and wrote some articles on that?           A. Yes, sir.

Q. Now, Mr. Daum, the Governor testified here that the money which was disallowed by the Federal Government in that case, which was made the subject of a report in Congress, was later paid. Do you know anything about that?

A. Yes, sir. I know that it has not been paid.

Q. It has not been paid? [352]

A. No, sir. The funds in question on the land evaluation that the Territory attempted to claim, the funds that were in contest through my story and in Congress, were thirty-eight thousand and some dollars that the Territory had claimed as matching funds for this false evaluation that they put on the airport. That thirty-eight thousand dollars was disallowed by the Comtroller General and has never been paid. The only thing that has been paid was the construction costs.

Q. You have kept in touch with that?

A. Yes, sir. In fact——

Q. Well, that is all right. We don't need to go into detail.

Mr. Faulkner: I think that is all, Mr. Daum. If the Court will pardon me, I just want to look over my notes.

(Testimony of Jack D. Daum.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Jack D. Daum resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows:)

Q. Mr. Daum, Mr. Small, a man named Small, testified here yesterday that he worked on the Empire at the time that the articles in question were published. Do you know him?

A. Yes, sir.

Q. Did he discuss these articles with you the night they were published? [353]

A. No, sir. Mr. Small was a reporter, and I was on the desk. There would be no reason for him to discuss them, and he did not.

Q. Did he ever come to you and complain about the articles?           A. No, sir.

Q. You were on the desk, and he was reporting?

A. Yes.

Q. Mr. Daum, Mr. Metcalf exclaimed here yesterday of the publication of his picture. Will you tell the Court and jury why you put Mr. Metcalf's picture in the paper on the front page?

A. I thought it was only fair. I put Mr. Moore's picture where I was quoting Mr. Moore, and, if I had Mr. Roden's picture, I would have put his in also to show in fairness that Mr. Roden and Mr. Metcalf were telling their side of the story. but I only had a cut of Mr. Metcalf.

(Testimony of Jack D. Daum.)

Q. Now, after this interview given you by Mr. Roden and Mr. Metcalf, did Mr. Roden later on verify that and corroborate what you had said in the paper?

A. Yes, sir; he did. He gave a written statement to the other newspaper in town, the Independent, in which he said the same things that he had told me, the fact that it was—well, for example, that the ferry had to be kept running because of the tourist—that it had been advertised in the States that the tourists could drive from [354] Juneau north, and they had to have the ferry for that, and the fact that the law did not permit—or that the question came up about this money should go into the general fund but that, if it did go into the general fund, it couldn't be taken out for operating purposes for the ferry so, therefore, it was put in this special fund so it wouldn't have to go into the general fund.

Q. And that other story was published in the——

A. Juneau Independent.

Q. ——Juneau Independent.

The Court: Would you fix the date of that, counsel? I understood from the testimony that the Juneau Independent was organized later.

Mr. Faulkner: Yes, I will.

Q. (By Mr. Faulkner): I hand you a copy of the Juneau Independent, Mr. Daum, and ask——

The Court: Are we correct in that, that the Juneau Independent was not organized?

A. No, sir. It had been organized at the time when I came.

(Testimony of Jack D. Daum.)

The Court: But it had not been published?

A. Yes, sir; it was.

The Court: Oh, it was?

Mr. Faulkner: Oh, yes.

A. They gave me a welcome when I came to town. Yes, sir; this is the edition and it is dated October 16th, three [355] weeks after the publication of the article—1952.

Q. 1952.

Mr. Faulkner: Well, I don't know—have you any objection?

The Court: Well, it certainly would be the best evidence. If the witness is telling about a story which appeared in the paper, the story itself should be the best evidence.

Mr. Faulkner: What is that?

The Court: If the witness is reciting what appears to be a story appearing in the Juneau Independent, the story itself should be the best evidence.

Mr. Kay: I have no objection to it.

The Court: It will be admitted.

Mr. Faulkner: I don't know whether—there might be something in here that would not be admissible, and for that reason perhaps we had better introduce only the pages that refer to the ferry fund, so I will offer Pages 1 and 12—that would be these two pages—if that is satisfactory.

Mr. Kay: As far as I know—

Mr. Faulkner: I don't think there is any other reference to it. I think it all appears on Pages 1

(Testimony of Jack D. Daum.)

and 12 of the issue of that day. That would be Defendant's Exhibit——

The Clerk: L.

Mr. Faulkner: ——L. [356]

Mr. Kay: Apparently, the rest of the paper has nothing further to do with it.

The Court: Then Pages 1 and 12 may be admitted in evidence.

The Clerk: Defendant's Exhibit L.

Mr. Faulkner: I think that is all, Mr. Daum.

#### Cross-Examination

By Mr. Kay:

Q. Mr. Daum, you say that Mr. Small did not discuss with you any of these articles or the editorial appearing on the front page, on the evening of the 24th, the night before they were published?

A. I said that; yes, sir.

Q. Was Mr. Small in the office that night, Mr. Daum?

A. Not to my recollection, at least not while I was making up the page. He may have come in later on after I had left, because Johnny often did that: covering sports or night stories, he would come in late and write a story.

Q. Well, on the evening of the 24th did you have a proof of the front page or a partial proof of the front page prepared at that time?

A. I didn't have a full page proof; no, sir. I had the galley proofs, but that is the single columns

(Testimony of Jack D. Daum.)

of type as they were set up by the machines, and I had my dummy [357] made up.

Q. Did you have your dummy made up or partially made up, Jack?

A. I had the dummy all made up as far as Page 1 was concerned.

Q. The dummy means a blank sheet of paper with your proofs—that is, your first run off the press to correct typographical errors is the proof, isn't it?

A. The proof is the first run off to correct typographical errors. The dummy is a blank sheet of paper just showing the headlines and the positions of the stories.

Q. Don't you usually paste your proofs—

A. No.

Q. You don't paste your proofs—

A. No. The dummy is a small piece of paper about tablet size.

Q. But you did have your column proofs for your stories?

A. Yes, sir. They were on the hook.

Q. Now, was Jim Beard there that night?

A. He wasn't there while I was making up. He may have dropped in later. I don't know. I don't remember whether he was or not.

Q. Do you recall discussing this sensational story or any portion of it with Jim Beard that evening?

A. I don't recall having discussed it with him. I may have [358] mentioned it to him, that that was

(Testimony of Jack D. Daum.)

what was coming out the next day, but I don't think there was any great discussion about it.

Q. Well, now, what time of the day, Mr. Daum, on the 24th did you have your interview with Neil Moore; do you recall?

A. Well, I saw Neil first—in fact I think I interviewed Neil on the 23rd and checked the bank on the 23rd, and it was the following day, the 24th, that I interviewed Mr. Roden and Mr. Metcalf and Mr. Dimond, so that it would be, I am quite certain, the 23rd I interviewed Mr. Moore.

Q. All right. How did you contact Mr. Moore? Did Mr. Moore call you and tell you he had a story for you, or did you—

A. No, sir. I was in the habit, when I was covering the Federal Building, of dropping in all of the offices, and I had talked to Steve Homer sometime before this, Steve Homer being the former mate of the Chilkoot Ferry, and Steve had told me that there was a story brewing on the ferry and to keep tab on it, that there was something going to break on this ferry.

Q. How long before this issue of September 25th was that discussion with Steve Larsson Homer?

A. Oh, it would be at least a week.

Q. Did Steve Larsson come to the paper and tell you that, [359] or did you happen to run into him?

A. No. As I remember, Steve came into the paper to pay for some advertising that had been done for something or other, and I first met him there when Mrs. Monsen introduced him to me at



(Testimony of Jack D. Daum.)

the newspaper, and I was talking with him then about the operation of the ferry, nothing in mind of a story. Then he told me to keep tabs on that ferry because there was something going to break on it pretty quick, so in the course of events as I saw Neil I asked him what was happening on this ferry fund, and he said, "Well, I think there is going to be a story there, but wait; I am checking it out," or something to that effect, and on the 23rd when I went in to see him I asked him if there was any news, and he said, "Well, you might be interested in this ferry fund," so he started breaking it to me.

Q. Then Neil had evidently talked to Steve Larsson Homer prior to the time that you talked to Steve about it?

A. Yes, sir. He had talked to him the month before.

Q. How long before?

A. The month before, in August.

Q. Sometime in August of 1952. When did you write your story, your lead story, in the right-hand column? I understood your leg work was done around the 23rd and 24th. At what time of the day, approximately, did you [360] write that story, Jack?

A. I wrote it in the evening; after I had gotten the paper of the 24th off the press and had gone out and had dinner, I came back to the office and I had my notes complete from my interviews and sat down and wrote the stories and the editorial.

Q. By "evening," do you mean afternoon or—

A. Well, yes; it would be four o'clock, five

(Testimony of Jack D. Daum.)

o'clock. The paper came out around one or two, and I would always go out and grab a bite to eat and come back to the office, so it would be around four or five o'clock.

Q. And you had these proofs then during the evening. Did you discuss and go over the proofs with Beard?

A. No. I don't believe I did, sir.

Q. Did Beard assist you in any way in laying out the front page dummy?

A. No; that wouldn't be very likely because I was handling the desk work at the time, Mr. Kay, and no, he did not assist me.

Q. He took no part in the preparation of the front page nor the layout of the paper of that day?

A. No, sir.

Q. You did that entirely by yourself?

A. Yes, sir.

Q. And Small, it is your testimony, you have no recollection [361] of his even being in the news-room that evening?

A. I don't recall him having been there at all.

Q. At that time you were a reporter, or, you say, you were on the desk; which was it?

A. Well, actually, both, Mr. Kay. It is a small newspaper, and we had Mrs. Monsen and two other people working for the paper, and at the time I got there Mr. Beard had been on the desk, but he had had no previous newspaper experience, and I took over the desk operation, so that I would go up and cover the Territorial offices in the morning, come back by ten o'clock or ten-thirty, write my

(Testimony of Jack D. Daum.)

stories, take the stories from the other reporters, dummy up Page 1, and get the paper out. Mr. Beard, when I got there, resumed his position as business manager.

Q. Ordinarily then you wouldn't get your dummy-up done until after you had covered the Federal Building in the morning?

A. It would vary; yes, sir. If I had enough material the night before to make up my dummy, why, it would speed getting the paper out if I got the dummy out the night before and keep the back shop happy.

Q. Now, if Mr. Small testified that he saw a page proof of the front page of September 25th in the newsroom on the evening of September 24th, would he be telling the truth?

A. A page proof, sir?

Q. Yes. [362]

A. No, sir; he couldn't have been. I didn't have a page proof until the following morning.

Q. Then, if he testified as he did, Page 9 of his deposition: "Yes, I did. I saw what we call a page proof of it." "You call it what?" "Page proof."—in the newsroom on the night of the 24th, he was mistaken or not telling the truth; is that correct?

A. That is correct. I think Mr.—I think Johnny was talking about the dummy that he might have seen on my desk.

Q. I thought you said a dummy was a small page without any articles?

(Testimony of Jack D. Daum.)

A. Yes; that is right; but Johnny was—I mean, he is not a desk man, and he may have called the dummy the page proof.

Q. Well, if he testified as follows: “I don’t recall exactly. I was coming in, as was my custom, to do work that I hadn’t gotten done earlier in the day and I think, if I recall, that I was at my typewriter for awhile and shortly after that I noticed Beard and Daum reading this page proof over at the managing editor’s desk and I walked over to see what they were discussing and what they were doing.”—was Mr. Small testifying truthfully there?

A. Mr. Kay, I don’t know why Mr. Small would say that, because it is just not true.

Q. It is just not true?

A. Yes, sir; it is not. [363]

Q. Did you have any—and then he goes on—“I will ask you whether or not”—the question is—“whether or not you had any discussion with Mr. Beard concerning this page proof?” Answer—“Yes, I did.” Did Mr. Small have any testimony, have any discussion with Mr. Beard concerning this page proof?

A. I don’t know. He may have talked to him.

Q. In your presence?

A. No; not in my presence; no, sir.

Q. Now, let me ask you this. In your presence there, and in the presence of Small, at that time, the evening of the 24th, when you were discussing, or when Mr. Small claims that the page proof was being discussed, I will read you a portion of Mr.

(Testimony of Jack D. Daum.)

Small's testimony and ask if it is true and correct:

Q. "Now, when Mr. Beard said, 'What do you think of this,' did he say anything else prior to your reading it?"—A.—this is an answer by Mr. Small; this is at the desk, the managing editor's desk—"Well, he made several comments and the one I recall, of course, is 'We have got the S.O.B. where we want him,' or something to that effect." Did Mr. Beard make any statement like that in your presence——

A. No, sir.

Q. ——there at the managing editor's desk?

A. No, sir. [364]

Q. Well, then, it is your testimony that at least in your testimony that at least in your presence Mr. Small had no discussion whatever concerning any of these stories that appeared on the front page concerning the Chilkoot Ferry, the front page of September 25, 1952, with you or Mr. Beard, Mr. Beard in your presence, that is, on the evening of the 24th?

A. That is correct, sir.

Q. Now, and I believe it was your testimony, was it not, Mr. Daum, that Mrs. Monsen knew nothing about this story until it appeared, this material that appeared on the front page in regard to the Chilkoot Ferry?

A. As far as I know, she knew nothing about it. She got nothing about it from me. I didn't talk with her about it.

Q. In other words, Mr. Daum, you—let's see—you had been alerted on this by Steve Larsson

(Testimony of Jack D. Daum.)

Homer about a week prior to September 25th; is that correct?

A. Sometime about that time; yes, sir.

Q. And then on the 23rd you were told by Neil Moore, "Here is a story on the ferry," and given the material from Neil Moore; is that correct?

A. Not exactly in those words; but I got it from Mr. Moore by questioning him; yes, sir.

Q. All right. You questioned Mr. Moore and got all the material from Neil Moore on the 23rd of September? [365]

A. Yes, sir.

Q. And then on the 24th of September you made your check, either—on the 23rd was when you checked at the bank, I believe?

A. Yes, sir.

Q. And then on the 24th you interviewed Roden, Metcalf and John Dimond; is that correct?

A. I don't know if I saw Mr. Dimond. I know, Mr. Roden and Mr. Metcalf, I interviewed them the same day. I may have talked to Mr. Dimond the day before.

Q. I see. Well, in other words, on either the 23rd or 24th you completed your complete investigation—

A. Yes, sir.

Q. —by interviewing Dimond, Roden and Metcalf?

A. Yes, sir; I did.

Q. And then you proceeded to write the stories and editorial on the evening of the 24th?

A. Yes, sir.

Q. So that you had page proofs before—I mean, not page proofs but proofs before you went home?

A. I had galley proofs—

(Testimony of Jack D. Daum.)

Q. Yes.

A. —of most of it. The linotype operators were getting into overtime, and I don't think that I had galley proofs of the editorial. I turned the editorial out and [366] I don't think I had galley proofs of the editorial until the following day, but I had my dummy out and I had all of the Page 1 out except Bob DeArmond's story and, possibly, except the editorial, but the majority of it was out to the shop and set in type.

Q. And then you published this issue of September 24th at your usual publication time on the early afternoon of Thursday, September 25, 1952; is that correct?

A. I published our 24th edition, you say?

Q. No. Your edition of the 25th came out with this material in it at about the usual publication time in the early afternoon?

A. I was about an hour early on it. I got it out about an hour early.

Q. About noon then?

A. Noon or one o'clock, thereabouts.

Q. It must have been right after the Chamber luncheon if Helen's story got in? A. Yes, sir.

Q. That would have to be set up and so on and so forth? A. It would have to be set in type.

Q. And proofed and etc.?

A. We skip proofreading occasionally.

Q. And that—it is your testimony then that, having uncovered this story on the 23rd, carried on your investigation [367] on the 24th, and published the information on the 25th, during all of that time

(Testimony of Jack D. Daum.)

you did not call any of it to the attention of the publisher of the newspaper, Helen Troy Monsen, nor discuss any portion of it with her?

A. There was no reason to. No, sir; I didn't.

Q. You had been on the newspaper on September 25, 1952, about thirteen days, had you not?

A. Thirteen—fifteen days; something like that; yes, sir.

Q. And yet you say you considered this a very important story?

A. I considered it a good story; yes, sir.

Q. Wouldn't you say you considered it, as a matter of fact, a tremendous scoop, in newspaper words?

A. You can't very well score a scoop when you are the only daily in town, Mr. Kay.

Q. Well, it was a sensational story; would you say that?

A. I would say it was a—I think your first word was right. It was an important story.

Q. And yet it is your testimony that you did not discuss any portion of it with the publisher of the newspaper during the three days prior to publication?

A. Yes, sir.

Q. Now, you had a business manager, or managing editor or whatever his official title may have been—Jim Beard?

A. Yes, sir. [368]

Q. Did you discuss any portion of this story with Jim Beard on the 23rd of September, 1952, at the time that you had your, or after you had your interview with Moore?



(Testimony of Jack D. Daum.)

A. Yes, sir. I told him the story I was after and the story I was digging out and told him what I was after.

Q. And did you have a further discussion with him on the 24th about the story?

A. As to discussion, Mr. Kay, I would say—I don't know. I don't recall any specific discussion.

Q. Did he go over the material with you?

A. Over my material?

Q. Yes. A. No, sir.

Q. You didn't go over the facts or alleged facts, which you had discovered, with Mr. Beard?

A. No, sir. I briefly outlined what the story was to him, and he said, "It sounds like a good one," or something like that.

Q. He didn't say, "We have got the S.O.B. now," though? A. No, sir.

Q. And then it is your testimony that you interviewed—did you discuss your interview with Roden or Metcalf with Beard?

A. I don't know if I did or not, Mr. Kay. I don't recall.

Q. Did you discuss your editorial, "Start Talking, Boys," [369] with Beard?

A. I may have. I don't recall.

Q. Did you discuss the parallel, your use of the parallel, of this situation with the Oscar Olson case with Mr. Beard?

A. No, sir. There was no need to. I don't believe I did; I mean, that is three years ago, Mr. Kay. I

(Testimony of Jack D. Daum.)

don't recall if I specifically discussed any of the points with him or not.

Q. Well, now, it is your testimony, isn't it, Mr. Daum, that you are the author of the editorial, of the front page editorial, entitled "Start Talking, Boys," on the front page of September 25, 1952?

A. Yes, sir.

Q. Did anyone else on the newspaper assist you in any way in the writing of that editorial?

A. No, sir. I might add—nobody assisted me in anything, in any of my writing on the newspaper.

Q. An editorial, Mr. Daum, as a newspaperman you can testify, I believe, that an editorial expresses the official policy of the paper, does it not?

A. Yes, sir; that is true.

Q. And so this editorial then expresses the official policy of the Daily Alaska Empire?

A. Insofar as I represented the Empire in— [370]

Q. You had complete authority to write editorials, lay out the front page, write stories, lay out the headlines, and issue the paper without supervision or check by any other person, did you not?

A. Yes, sir; that is true.

Q. And you did so?           A. I did so.

Q. Now, you testified—you wrote in your story, did you not, the following paragraph—you may check with a copy if you wish—the fourth paragraph; I think you will recognize it all right; the fourth paragraph in your lead story, you wrote, did you not: "The case closely parallels that of

(Testimony of Jack D. Daum.)

Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." You wrote that language, did you not?      A. Yes, sir.

Q. Now, what check had you made on the conviction and sentence of Oscar Olson, former Territorial Treasurer, on his previously entered plea of guilty, if any?

A. What check had I made on the Olson case?

Q. Yes.

A. Well, only to the extent of Mr. Moore showing me the statute under which Mr. Olson was sentenced and pointing out that this was the same statute that was being [371] violated in this story——

Q. I see.

A. ——and that the method of depositing and withdrawing of funds in a private bank account was the same.

Q. Mr. Moore pointed that out to you?

A. Yes, sir.

Q. Well, you knew, did you not, that Oscar Olson had converted the Territorial money to his own use, had actually embezzled thousands of dollars of Territorial money and put it in his pocket and spent it for his own purpose?

A. I recall the story; yes, sir.

Q. You knew that, did you not?

A. From reading the paper; yes, sir.

Q. And you knew that that was the fact or the

(Testimony of Jack D. Daum.)

reason or the basis upon which Oscar Olson had been sentenced, convicted and sentenced, and sent to McNeil Island Penitentiary, did you not?

A. Yes; I knew he had been convicted under this statute covering embezzlement.

Q. Of embezzlement of public funds for his own use?      A. Yes, sir.

Q. Stealing?

Mr. Faulkner: Pardon me——

Q. You knew that, did you not?

Mr. Kay: This is cross-examination. [372]

A. Yes; I knew that the statute—I knew the statute under which he had been convicted, Mr. Kay.

Q. (By Mr. Kay): And then it was your intention, was it not, in comparing this matter to Oscar Olson to imply that these men had also been guilty of converting public money to their own use?

A. No, sir. There is no place in that article that I say they converted money to their own use.

Q. But you said, you suggest that it “closely parallels” the case, “that of Oscar Olson”?

A. In the receipt and disbursement of public funds.

Q. Oscar Olson, however, you have just admitted, was convicted of embezzling and converting this money to his own use and putting it in his pocket and stealing it from the Territory?

A. And that is where the parallel ends. It is a close parallel but not—it is a close parallel in that

(Testimony of Jack D. Daum.)

the same method was used and the same statutes applied.

Q. In other words, the only parallel, Mr. Daum, as a matter of fact, is that money went into a bank and money came out of a bank?

A. No, sir; that is not the only parallel in my estimation, and I didn't believe that was the only parallel at the time.

Q. You say Mr. Moore showed you the law in that regard? [373]           A. Yes, sir.

Q. Mr. Moore had the law all laid out and prepared at the time you got there?

A. No, sir. I asked him for it.

Q. He had it accessible?           A. Yes, sir.

Q. Did you go over the law with Mr. Moore?

A. I just asked him what section it was that this came under, and he pointed it out to me, and I asked him how the methods compared, because I wasn't familiar with the details of the Olson case so far as how the money was handled, and he pointed out that the same method of taking Territorial money, putting it in a bank account and taking it out without the Auditor's knowledge, unauthorized, was the same method.

Q. And that is where the parallel ended?

A. Yes, sir.

Q. In other words, at that point Mr. Olson put the money in his pocket or made off with it or did whatever he did—we don't know what he did with

(Testimony of Jack D. Daum.)

it, perhaps—and you didn't intend of course to imply that these men did that?

A. No, sir. If I had, I would have said so.

Q. Well, that would have been clearly and obviously a gross libel if it was not true, would it not? [374]

A. If not true?

Q. If you had said that?

A. If I had said that? If it weren't true, sir, I wouldn't have said it.

Q. Now, you said that you got this check, which you photostated and printed on the front page, Mr. Daum, you believe that you got it from Mr. Moore?

A. I believe I got the photostat from Mr. Moore; yes, sir.

Q. The photostat or the check?

A. The photostat.

Q. How did you happen to select this particular check from the number of other checks that Moore had?

A. This was the only check I had seen, sir.

Q. Did you not testify on direct examination that Moore had a number of these checks?

A. No, sir. This is the only check I saw.

Mr. Kay: How much trouble would it be for you, Miss Maynard, to check Mr. Daum's testimony to see if he did not testify on direct examination that Moore had a number of these checks? Will you make such an examination during the lunch hour please and see if you can find that point in his testimony? I believe it was about midway through

(Testimony of Jack D. Daum.)

his direct examination by Mr. Faulkner, if my notes are correct and of course they may not be.

The Reporter: Yes, sir. [375]

Q. (By Mr. Kay): Now, Mr. Daum, is it your testimony that Mrs. Monsen never laid down or advised you in any way as to the editorial policy of the Empire with regard to Governor Gruening and his administration?

A. Not specifically Mr. Gruening; no. The only policy I got from Mrs. Monsen was over that period of two weeks that I worked for her and when she would—I would get policy from her when she would either compliment me on a story or telling me it was good writing or, as I said, when she criticized me for having placed this road inspection trip in quotes, but she never directly come out and said, "Now, the policy of the paper is" this or any such thing. She is not that type.

Q. Well, would it be your testimony then that you at the time you published this edition of September 25, 1952, you had no idea as to whether the attitude of the publisher of the Empire toward the Gruening administration was favorable or unfavorable?

A. Well, sir, of course I knew that the Daily Alaska Empire had published the Palmer story and had been critical of the Governor on that story.

Q. They have been critical of the administration practically on every item over a period of years, have they not?

A. Just as had the other papers that I worked

(Testimony of Jack D. Daum.)

on—the News Miner and the Ketchikan News and the Daily News in [376] Anchorage, they were all critical of the Gruening administration.

Q. Did you work on the Ketchikan News?

A. No; not work with it, but associated.

Q. The Daily News in Anchorage?

A. Stringer; I wrote stories for them; yes, sir.

Q. Your employment actually was for the Fairbanks Daily News Miner?

A. Daily News Miner; yes, sir.

Q. Now, the Fairbanks News Miner was at that time owned by that distinguished old Alaskan, Cap Lathrop?

A. Yes, sir.

Q. Later, it has been sold, or since your time it has been sold, has it not?

A. Yes, sir.

Q. And when you worked for the News Miner—I may be going far afield there. Well, in your work on the News Miner then you were acquainted with the editorial position or policy, let's say, of the Alaska Daily Empire, or Daily Alaska Empire, as being comparable to that of the News Miner with regard to the Gruening administration?

A. Yes, sir. We received all the Territorial newspapers on an exchange basis and we knew the editorial policies of each; yes, sir.

Q. Then it would not be—in going to work for the Empire you [377] would expect to follow, generally, the editorial policy of the paper for which you worked, would you not, Mr. Daum?

A. Generally; yes, sir.

Q. So in your position, coming to the News



(Testimony of Jack D. Daum.)

Miner, or to the Empire from the News Miner, and being acquainted with the Territorial political machine, machinery, it would not be necessary to indoctrinate or instruct you on policy to the extent that it might be necessary with regard to someone coming up from the "Outside" cold; I mean the editorial policy, the general policy of the paper; it would not be necessary, would it?

A. No, sir. Mr. Kay, so far as policy goes, with any newspaper the major point of policy is whether or not you report the news fairly or not. That is the first basis of reporting.

Q. Right.

A. And the two papers in that respect had the same policy.

Q. Well, there is more than that to editorial policy, is there not? Isn't there the position of whether or not you are, for example, generally on one side or the other as far as the political parties go?

A. No, sir. As far as that goes, the Daily Alaska Empire was a Democrat newspaper and the News Miner was Republican, but we agreed on a number of points. [378]

Q. You agreed on one thing and that is on opposition to the Gruening administration?

A. No, sir. We agreed on specific points that would come up where the administration had either gone far afield from the law or committed acts which were subject to public scrutiny and brought those acts out.

(Testimony of Jack D. Daum.)

Q. Your position then is that there was no general policy of the Empire in over-all opposition to the Gruening administration, so far as you know?

A. Not opposition, sir. The fact that the administration committed many acts which were brought to the public attention in the press may have made it—you can't construe that to be a policy, the fact that these different stories were stories concerning acts of the administration. There was no other administration to print stories about.

Q. And so you are not then—to get back to the question again—you are not aware of any general editorial policy of the Daily Alaska Empire in opposition to the Gruening administration, or are you?

A. I am in respect to certain cases which have come up—the Palmer Airport case and the illegal session.

Q. And with respect to almost every attitude of the administration?

A. No, sir. There were numerous attitudes that the Governor [379] had that the Empire was favorable to.

Q. I am almost tempted to ask you if you can name one. You probably could name one. Now, you testified, did you not, that on the 24th, I believe, of September you interviewed both Henry Roden and Frank Metcalf as to the story which you had gleaned from Neil Moore?      A. Yes, sir.

Q. And you are sure of that, that you interviewed both of them, Mr. Daum?

(Testimony of Jack D. Daum.)

A. That I interviewed both? Yes, sir.

Q. Is it possible that you are mistaken and that you interviewed Mr. Metcalf on that day and did not in fact interview Mr. Roden until the day following the appearance of the issue of September 25th?

A. That is impossible, sir, because it was Mr. Roden that told me to go see Mr. Metcalf.

Q. Well, you did again interview Mr. Roden on the 26th, did you not? A. Yes, sir.

Q. And you published another story on the 26th covering that interview with Roden? I will show it to you and ask you if you recall it.

A. Yes, sir.

Q. Now, that was gained by you, written by you, was it? A. Yes, sir. [380]

Q. And written by you on the basis of an interview with Roden on or about the 25th or 26th? It appeared in the edition of the 26th.

A. Yes, sir.

Q. So it was an interview with Roden after the appearance of this article?

A. This was; and I interviewed him every day after that for about a week.

Q. This is specifically after the interview with—I mean, after the appearance of the September 25th issue? A. Yes, sir.

Mr. Kay (Handing proposed exhibit to defendant's counsel): I offer this in evidence.

The Clerk: Plaintiffs' Exhibit No. 10.

(Testimony of Jack D. Daum.)

The Court: If there is no objection, it may be admitted.

Q. (By Mr. Kay): Now, did you in your interview with Mr. Metcalf question him as to the legality of the method of operation which had been adopted with reference to the ferry, Mr. Daum?

A. May I look at my notes, Mr. Kay?

Q. If it is necessary for you to look at your notes to refresh your recollection, you of course may.

A. Yes, sir; because he said something about the Attorney General having said something in that meeting concerning [381] the legality of it. (Looking at notes.) It was the Attorney General advised—let's see. The receipts would have been enough to pay the operating expense; the receipts from the ferry, he said, if he could have used the receipts from the ferry directly back to pay the operating expense of the ferry, they would have been enough to run it on, but the Attorney General advised that they couldn't, and it had to go in the general fund; normal channels couldn't be used—and then the only other reference to legality was where he said there was nothing crooked at all, aboveboard, open to audit at any time.

Q. Now, you are sure, are you, that Mr. Metcalf used the words that you have placed in quotation marks in your headlines, the words "Nothing Crooked"?

A. Yes, sir. As a matter of fact, both he and Mr. Roden.

(Testimony of Jack D. Daum.)

Q. Both he and Mr. Roden? A. Yes, sir.

Q. They both happened to hit on that happy phrase?

A. Well, I believe Mr. Roden expressed that feeling first, and, when I was talking to Mr. Metcalf, I may have told him that I talked to Mr. Roden and what he had to say, and Mr. Metcalf might have said, "That is right."

Q. You talked to Mr. Roden prior to talking to Mr. Metcalf? A. That is right; yes, sir.

Q. Now, you are positive, are you, that Mr. Metcalf used the [382] phrase "trick of book-keeping"?

A. Yes, sir.

Q. That is a quotation? A. Yes, sir.

Q. That is directly a quotation, words of his?

A. Yes, sir. He said, "Mr. Roden felt that a special fund was the only way of handling these funds instead of them going in the general fund. Mr. Williams had no objection. It was unanimous. Mr. Daum, it is just a trick of bookkeeping. They had to be kept out of the general fund or we couldn't use them; they had to be kept out of the general fund or they couldn't be used," something like that.

Q. Where did you get those notes to which you are referring, Mr. Daum?

A. These I left in my desk when I left the Empire.

Q. And when did you leave the Empire?

A. In '53.

Q. In 1953? A. Yes.

(Testimony of Jack D. Daum.)

Q. And when did you next see those notes?

A. When Mrs. Monsen handed them to me when I came down to Ketchikan.

Q. That is a couple of days ago?

A. Yes, sir. [383]

Q. Do you have any idea of how they happened to be preserved?      A. Yes.

Q. Where did you leave them, as far as you can recall?      A. In my desk drawer.

Q. When you finish writing a story, do you ordinarily save your notes?

A. No, sir; I don't. In fact, this isn't all of them.

Q. What?

A. This is not all of my notes. This is just what I happened to throw into the drawer, I guess.

Q. And Mrs. Monsen happened to find them?

A. Yes, sir.

Q. They were prepared at the time of these interviews; is that your testimony?

A. Yes, sir.

Q. Now, in your discussion with Mr. Roden did you ask Mr. Roden concerning the legality of this method of operation?

A. I don't know if I asked him specifically about the statute. I believe he prefaced his remarks with the fact that there was nothing crooked about the whole thing; that it was all open and above-board, or words to that effect; so I just asked him about the facts of the matter rather than his opinion as to the legality of it.

(Testimony of Jack D. Daum.)

Q. When you went in to see Mr. Metcalf and asked him about [384] this, did he produce a copy of the minutes of the Board of Road Commissioners? A. Yes, sir.

Q. For June 5, 1952? A. Yes, sir.

Q. Now, Mr.—well, you had only been there about thirteen days; that is true. Had you had occasion to visit Mr. Metcalf's office prior to the time that you went to see him on this occasion?

A. Yes, sir; just about every day.

Q. Every day?

A. Just about every day; yes, sir.

Q. Now, when Steve Larsson Homer brought up this matter about "Watch for a story on the ferry fund," you knew that Mr. Metcalf was, generally, in charge of the operation of the ferry, did you not, at that time? A. No, I didn't at that time.

Q. You didn't know that the Board of Highway Commissioners ran the ferry?

A. No, sir; I didn't.

Q. Didn't Steve Larsson Homer tell you that?

A. No. In fact he just mentioned it briefly and said he had been working for the ferry and "By the way, you ought to watch that. There is going to be something come up in that. See Neil Moore. He has got all the facts." [385]

Q. At that time did you speak to Neil Moore about it?

A. No, sir; I didn't. I just let it drag until it came to my mind.

Q. Until Moore brought it up?

(Testimony of Jack D. Daum.)

A. No. Until I asked Moore about it. When you are handling five or six stories a day, you don't try to crowd any more work on yourself than you can help.

Q. Well, you let it go for about a week then, until you happened to ask Moore about it?

A. Yes, sir.

Q. Did you know that Metcalf was on that Board?

A. When Mr. Moore told me; yes, sir.

Q. You didn't know it prior to that time?

A. No; I didn't.

Q. Did you know the Governor was on that Board?

A. The Governor is chairman of all boards.

Q. Well, you interviewed the Governor just a few days prior to this time about his trip in leaving Juneau, did you not?

A. Yes, sir.

Q. And that was after you talked to Steve Larson Homer?

A. I believe it was.

Q. Did you bring up this question, that you understand there was something brewing on the Chilkoot ferry, or ask him about that? [386]

A. No, sir. I didn't even know the Governor was involved.

Q. Well, you knew he was the chairman of all the boards, you just said.

A. Yes. You asked me if I knew that he was on that Board. I said he was chairman of all boards. But I didn't know at the time that the Board was involved in the ferry. I just didn't know—



(Testimony of Jack D. Daum.)

Q. You didn't know who ran the ferry?

A. Sir?

Q. You didn't know who ran the ferry?

A. No, sir; just that the Territory did.

Q. I believe in that connection you testified, did you not, that Mrs.—that the one occasion on which you were called, that Mrs. Mosen had occasion to perhaps express the editorial policy of the Empire to you, was in connection with a story that you wrote at that time about the Governor leaving Juneau on this trip? A. Yes, sir.

Q. And I believe you said, did you not, that in that story that you had put the words "road inspection tour" or words to that import in quotation marks with the implication that that was a cover-up for a political junket? A. Yes, sir.

Q. And that Mrs. Mosen criticized you for that? A. Yes, sir. [387]

Q. Well, did she criticize you for repeating it in your story on September 25th?

A. No, sir, she didn't; that I know of.

Q. In other words, you did repeat it in your story on September 25th, did you not?

A. Yes, sir.

Q. You again characterized the Governor; you said that the Governor "has not returned from his pre-election 'road inspection' tour and was not available for comment today." A. Yes, sir.

Q. So you in that instance not only set the policy of the paper but flouted what the publisher had warned you about?

(Testimony of Jack D. Daum.)

A. And, even if I did, I had an argument with Mrs. Mosen on that, and I still believe that I am right.

Q. I see. In other words, it is your testimony that Mrs. Mosen in this regard was more interested in protecting the Governor of Alaska than you were?

A. No, sir. She was interested in protecting the integrity of the paper.

Q. Well, more interested in eliminating editorializing from the news columns of the Empire?

A. Yes, sir.

Q. That is editorializing, is it not?

A. Yes, it is. [388]

Q. And, as a newspaperman, you know that editorializing in news columns is bad journalism, is it not?

A. I wouldn't say it was bad journalism. It is——

Q. It is considered bad journalism, is it not, by most respectable newspapermen?

A. To an extent; yes.

Q. Editorials are to be put in editorials, and news items are to be put in news articles?

A. Yes, sir.

Q. And that is editorializing a news item, is it not?

A. Yes, sir.

(Whereupon, the trial was recessed until 2:00 o'clock p.m., November 17, 1955, and resumed as per recess, with all parties present as

(Testimony of Jack D. Daum.)

heretofore and the jury all present in the box: the witness Jack D. Daum resumed the witness stand, and the cross-examination by Mr. Kay was continued as follows:)

Mr. Kay: I wonder if the Court reporter was able to locate during the lunch hour the reference—Mr. Daum's direct examination about which I had inquired previously. Were you, Miss Maynard?

The Court Reporter: Yes, sir.

Mr. Kay: I wonder if you would read the portion of the testimony in that regard?

The Court Reporter: Yes, sir. "Q. Now, Mr. Daum, you published a copy of a check issued to Steve Homer, No. 49, [389] dated August 20, 1952, signed Chilkoot Ferry by Robert E. Coughlin, on the Behrends Bank. Where did you get that check?" "A. I believe we obtained it from Mr. Moore, sir." "Q. You think you got it from Mr. Moore?" "A. Yes." "Q. Are you sure?" "A. No; I am not certain but I am quite—well, I don't know how to say it—I am quite certain but not positive that we obtained it from Mr. Moore." "Q. And Mr. Moore had a number of these checks, did he?" "A. Yes, sir."

Q. (By Mr. Kay): Now, is that——

Mr. Faulkner: What was that last question and answer?

The Court Reporter: "Q. And Mr. Moore had a number of these checks, did he?" "A. Yes, sir."

(Testimony of Jack D. Daum.)

Q. (By Mr. Kay): Is that correct, Mr. Daum?

A. Yes, sir. What I should have said was photostats. He had a number of photostats of the same check, and I got the photostat from him. I only saw the one check.

Q. I see. Then what you meant was that he had a number of photostatic copies of the same check?

A. Yes, sir.

Q. And that is your explanation?

A. Yes, sir.

Q. Now, you state that the Laredo, Texas, paper, which you happened to run across, is an example of the same thing as the headline over the check in question in this case; [390] is that correct, Mr. Daum? A. Yes, sir.

Q. Then it would be your interpretation of this, that the headline "Soviet Peace Proposal Rejected," appearing over a picture of Ike and Mamie leaving the hospital, would be interpreted to refer to the headline "Soviet Peace Proposal" in the same way that the headline "Reeve Raps Graft, Corruption" would be in relationship to the photostatic copy of the check?

A. Just the opposite. I mean to infer that you do not ordinarily associate the picture with the line, but it is a common practice to put your four-column banner or your headline, to extend it over four columns but still have different stories or pictures underneath it that have no connection with it whatsoever.

(Testimony of Jack D. Daum.)

Q. Isn't it common to have your story to which the headline refers in the right-hand column of the headline?

A. No, sir.

Q. Common practice?

A. No, sir. Here is one here that reads out of the left-hand. It is either way.

Q. Then it is your testimony that these are similar situations?

A. Similar situations in that the headline has no bearing on the picture which is beneath it. [391]

Q. Of course the "Soviet Peace Proposal Rejected" does have a subheadline, does it not—"Conference Hits Snag on Disarmament"?

A. Yes, sir.

Q. The story "Reeve Raps Graft, Corruption" does not have a subheadline?

A. It did have until I found Mr. Reeve's picture and took the subheadline out to make room for the picture.

Q. As published it does not have a subheadline?

A. Correct.

Q. When was the headline "Reeve Raps Graft, Corruption" written, to the best of your recollection, Mr. Daum?

A. That is the story that Mr. DeArmond turned in the night before, and I don't believe I wrote the headline until the next day. I dummied it in but didn't write the headline until the following day.

Q. Then you are sure in your own mind, are you, that the headline was not written the night before, on the evening of September 24th?

(Testimony of Jack D. Daum.)

A. Quite certain; yes; I don't want to swear to that, but, as I remember, it was written the next morning.

Q. Now, then, if Mr. Small testified that in the discussion with Beard—Mr. Beard, Mr. Small and yourself—that he pointed this particular headline out; in other words, as he said: "I recall I pointed out to Beard that he had [392] in the make-up heads such as that, 'Reeve Raps Graft, Corruption'" alongside of the other headlines; Mr. Small would not be telling the truth; is that correct?

A. Sir, he couldn't be, because we didn't have a page proof that night. No; he is not telling the truth.

Q. If he testified that you did have a page proof that night, he is not telling the truth?

A. That is right, sir.

Q. Now, the story "Reeve Raps Graft, Corruption" is a—do you care to look at it?

A. No. I can remember it.

Q. It is in general a story of a speech delivered by Bob Reeve at the Baranof Hotel at a Republican rally that night, is it not? A. Yes, sir.

Q. Delivered the evening of the 24th of September, 1952? A. Yes, sir.

Q. Do you know anything actually of your own knowledge about the writing of that story by Bob DeArmond?

A. I know that he wrote it; yes, sir.

Q. Do you know of your own knowledge, Mr. Daum, whether or not DeArmond had an advance

(Testimony of Jack D. Daum.)

copy of Reeve's speech? A. No, I don't.

Q. You don't know? A. No. [393]

Q. You don't know whether or not Mr. Reeve was in the habit, as many candidates are, of preparing copies for the press and distributing them prior to the speech? A. No, I don't.

Q. It is possible, is it not, that Mr. Reeve did give Mr. DeArmond an advance copy of his speech?

A. It is possible; yes, sir.

Q. That wouldn't be unusual?

A. It would not be unusual.

Q. Then it is possible that Mr. DeArmond might have written that story prior to the holding of the banquet? A. No, sir.

Q. It is not possible? A. No, sir.

Q. Why isn't it possible?

A. Because I know he came in that night to write it.

Q. What time did he come in?

A. It was rather late. It was after I had finished writing my other stories, and Bob came in; after I had finished and was ready to leave, he came in to write this story.

Q. Had he written any portion of it at that time, or do you know?

A. I don't think—not to my knowledge, he hadn't.

Q. Is it possible that he had most of it written except for putting it in paragraphs? [394]

A. He could have had it written in his notes. I don't know.

(Testimony of Jack D. Daum.)

Q. Did you have that story on the evening of September 24, 1952?

A. I didn't; no, sir. The paper did.

Q. The paper did have it?

A. Bob had written it that night and left it on the desk; yes, sir.

Q. Did Beard have it that night?

A. I don't think so.

Q. Was it set into type that night?

A. No, I don't think it was, because the reason I quit was the—I mean, the reason I quit that night was because the linotype operators were through for the night, and I don't believe they were—in fact, I know they weren't working when Bob came to work.

Q. Well, then, if, again referring to Mr. Small, if he testified that that story was on a page proof that night, he is mistaken not only because it wasn't written but because there was no page proof?

A. Yes, sir.

Q. I wonder if I could ask who employed you on the Empire, Mr. Daum?

A. Mrs. Monsen employed me.

Q. Mrs. Monsen employed you. I believe you testified on direct examination that you received no indoctrination [395] or instruction by Mrs. Monsen with regard to the editorial policy of the Empire?

A. That is correct.

Q. May I ask you if you received any indoctrination or instruction by Jim Beard concerning the editorial policy of the Empire?

A. No, sir.



(Testimony of Jack D. Daum.)

Q. None whatsoever? A. No, sir.

Q. No suggestion by Beard that the Empire did or did not have a certain attitude toward anyone or a certain policy toward anyone?

A. No. On the contrary. I had been in Alaska longer than Mr. Beard, and he realized that.

Q. Who was doing the work on the Empire prior to your going to work there about thirteen days before this article was written?

A. Who was working on the editorial desk, you mean?

Q. Yes. Who was handling this work that you took over; do you know?

A. I assume Mrs. Monsen and Mrs. Pegues, Johnny and Mr. Beard.

Q. Your particular job on the desk, was anyone handling that, that you know of, or do you know?

A. I don't know, as a matter of fact; no. Mrs. Monsen can [396] tell you.

Q. Now, during the period of time that you were employed by the Empire prior to September 25, 1952, had you written any previous editorials; had you written any editorials during that period?

A. Prior to 1952?

A. No. Prior to—any editorials for the Empire during the preceding thirteen days that you worked for the Empire, prior to the issue of September 25th?

A. I believe so. I would have to look back through the copies to make certain.

Q. You don't know whether you did or not?

(Testimony of Jack D. Daum.)

A. I believe I did.

Q. A few; many; regularly every day?

A. Well, it wouldn't be very many, sir, because I was only there thirteen days; but I am trying to recall any specific—this was National Newspaper Week. I think I had done an editorial on National Newspaper Week. I don't know. I would have to look back through the files, but I could tell you which ones I had written.

Q. Had you placed any editorials, if you did write any during that thirteen-day period, had you placed any of them on the front page of the Empire? A. I don't believe so.

Q. Placing this editorial on the front page of the Empire [397] was intended by you to indicate your feeling on the importance of the story, was it not? A. Yes, sir.

Q. Now, calling your attention to the issue of the Empire the following day, September 26th; there are two items pasted on this page: I will just address your attention to the smaller one at this time, a small box entitled, or a box entitled—the title is "Attention." Do you know who wrote that item? A. Yes, sir. I wrote that.

Q. You wrote that. And that appeared, that item marked "Attention" there, appeared on the front page of the Daily Alaska Empire, for September 26, 1952, did it not? A. Yes, sir.

Q. Were you responsible for placing it on the front page, Mr. Daum? A. Yes, sir.

Q. You made up the front page on the 26th as well as on the 25th? A. Yes, sir.

(Testimony of Jack D. Daum.)

Q. Did you have any discussions with anyone prior to writing and publishing the item labeled "Attention" on September 26, 1952?

A. Yes, sir; I had discussions.

Q. Would you state who you had such discussions with? [398]

A. Well, Mrs. Mousen, for one.

Q. Any other persons, to your recollection?

A. I believe Elmer Friend had dropped in at that time.

Q. Was he then employed by the Empire?

A. No; he wasn't. He had been.

Q. Just anyone else, if you can recall?

A. Well, I don't recall the other names, as to who I talked to about it.

Q. As to the other item on this sheet, it is an editorial in rather bold-faced type appearing on October 6, 1952, I believe on the front page of the Alaska Daily Empire. Were you employed by the Empire on that day? A. Yes, sir.

Q. Do you know who wrote that editorial?

A. Yes, sir.

Q. Will you state who it was? A. I did.

Q. You wrote that editorial? A. Yes, sir.

Q. And did you also place it on the front page of the Daily Alaska Empire? A. Yes, sir.

Mr. Faulkner: What date is that?

Mr. Kay: October 6, 1952. "An Editorial. Intimidated?" [399]

Mr. Faulkner: Are you going to introduce them?

(Testimony of Jack D. Daum.)

Mr. Kay: Yes; now that he has identified both of them as having been written by him and placed on the front page of the Empire. This is October 6th, and the other he has identified already. There being no objection, Your Honor, I will offer them in evidence.

Mr. Faulkner: One of September 26th and the other——

Mr. Kay: And the other of October 6th.

Mr. Faulkner: Are you offering them both together?

Mr. Kay: I was just going to leave them together, if that is all right.

Mr. Faulkner: It is all right; yes. I wanted to get the numbers straight.

The Court: There being no objection, the two editorials may be admitted in evidence.

Mr. Faulkner: That will be No. 11, will it?

The Clerk: Yes.

Mr. Kay: Ladies and gentlemen, I will read this item entitled "Attention," because it is short and should be brought to your attention at this time. The item appeared on the front page of the Empire in a box, a black box, as you can see here, entitled "Attention: Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined [400] to a federal prison.

"It was not our intention to infer that there has been any misappropriation or theft of these funds,

(Testimony of Jack D. Daum.)

but merely that in both cases, checks were drawn against Territorial funds in bank accounts without being offered for the scrutiny of the Office of the Auditor as provided for by the law.

“The Empire regrets any misunderstanding that may have arisen from this paragraph and hastens to repeat that there has been no evidence of any fraudulent or personal use of any of the funds in the special account.”

Q. (By Mr. Kay): And that was written by you and published on the front page of the Empire on the following day; is that correct?

A. Yes, sir.

Q. Had it been called to your attention prior to your publication in the writing and publishing of that item that persons had interpreted your article of the previous day as implying that there had been a theft or embezzlement of public funds?

A. Prior to publication?

Q. No. After your publication of the previous day and prior to this publication, had it been called to your attention by anyone that persons did interpret your article of September 25th as inferring that there had been a theft or misappropriation of public funds? [401]

A. No, sir; not that they did; just that they may have; that there was a possibility of the misinterpreting that one paragraph.

Q. That applies only to that one paragraph of the article?

A. Well, to the article. The idea was that some-

(Testimony of Jack D. Daum.)

body might misinterpret the article to get the idea that we were accusing the Governor, the Treasurer and the Highway Engineer of theft or misappropriation of their funds. No such intention was meant.

Q. Now, I want to get this very clear. The first paragraph reads, Mr. Daum: "Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined to a federal prison." And that is the paragraph concerning which that item was published, is it not?

A. Yes, sir.

Q. That paragraph being the one in the lead story written by you: "The case closely parallels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island Penitentiary for violating the law in the receipt and disbursement of public funds."

A. Yes, sir.

Q. Now, I believe you testified, did you not, on direct examination, Mr. Daum, that your use of that parallel [402] was based upon a discussion of the law which you had with Auditor Neil Moore; is that correct?      A. Yes, sir.

Q. May I ask if—and in your article you cited a number of sections of the Territorial law. I will show you those references, Mr. Daum. I don't believe there were any prior to this. There is one ref-

(Testimony of Jack D. Daum.)

erence here—"the written opinion that, under Section 12-2-1, ACLA 1949, it is mandatory that the money be placed in the general fund." Then a reference to the '51 Reorganization Act—another citation. Then follows the letter of Neil Moore and his reference, embodied by you in your story, referring to Section 11-3-8, ACLA 1949, Section 12-2-1, ACLA 1949, and Section 12-3-1, ACLA 1949. Now, are those the—is that the law that you discussed with Mr. Moore, Mr. Daum?

A. That and the other section—sixty-five-dash-something-or-other, under—the section under which Mr. Olson had been sentenced.

Q. That would be——

Mr. Kay: Might I have Volume III please, Your Honor?

Q. (By Mr. Kay): That is the section of the Territorial law on embezzlement, is it, Mr. Daum? I will show it to you.

A. I am no attorney, Mr. Kay. [403]

Mr. Faulkner: 65-3——

Mr. Kay: Isn't it 63?

Q. (By Mr. Kay): May I ask you, while I am looking this up, Mr. Daum, if you and Mr. Moore actually went over these particular sections?

A. Just the one. He pointed out to me the section under which Mr. Olson was sentenced and said it is the same thing; there is no difference; you can draw a parallel here; anybody can see the parallel.

Q. 65-5-63; is that it? If you recall, Mr. Daum,

(Testimony of Jack D. Daum.)

will you state whether this is the section which Mr. Moore showed to you and went over?

A. I believe so. If it says that—yes, sir; that is it.

Q. That is the section that Mr. Moore showed you and which you discussed with him; is that right?

A. Yes, sir; quite certain.

Q. Let the record show that the—of course you are reasonably sure that is it?

A. Yes, sir.

Q. —that the witness has referred to Section 65-5-63. “Embezzlement of public money.”

Well, Mr. Daum, did you ever check the actual record or the judgment and sentence of execution of Oscar Olson?

A. No, sir; I didn't. [404]

Q. Prior to publishing this story, or at any time?

A. No, sir. I took Mr. Moore's word for it. In fact I was reporting what Mr. Moore said. I was printing his beliefs, although I believed it myself also.

Q. It would then come as a surprise to you if you examined this certified copy of the Judgment and Commitment of Oscar G. Olson, done in open court on the 3rd day of January, 1950, to find that Mr. Olson had been convicted under Section 7-1-9, ACLA 1949?

A. I believe——

Mr. Faulkner: Just a minute. I object to that question, Your Honor. The witness has testified as to the section under which Mr. Olson was sentenced, not convicted, sentenced.



(Testimony of Jack D. Daum.)

Mr. Kay: The section under which he was sentenced?

The Court: He did testify——

Mr. Faulkner: He was convicted under another section, and sentenced under this section—65-5-63. We have made that distinction all the time.

The Court: How could it be possible that a person convicted of crime could enter a plea under one section and be sentenced under another section?

Mr. Faulker: Well, if Your Honor will read the section that he violated, it provides that the punishment be under the other section. [405]

Mr. Kay: In other words, it merely says it shall be punished as embezzlement.

Mr. Faulkner: Yes.

The Court: I haven't seen this exhibit.

Mr. Kay: The exhibit does show——

Mr. Faulkner: It shows the section violated.

Mr. Kay: ——in violation of Section 7-1-9, ACLA 1949.

Mr. Faulkner: If the Court wants to look at it, it will see that the punishment is provided under another section.

The Court: Just a moment. May I look at it? "Embezzlement of public money."

Mr. Kay: Yes, Your Honor. The only point, Your Honor, that we are considering here is Mr. Faulkner's objection to my question, which I think is a perfectly proper one, merely asking the witness to examine the Judgment and Sentence and state the section under which Mr. Olson was convicted.

(Testimony of Jack D. Daum.)

The Court: Well, but what happened here is that the witness has testified, as I understood him, that he was informed by Mr. Moore that this Section 65-5-63 is the statute under which Olson was convicted.

Mr. Faulkner: No. Sentenced, your Honor.

The Court: I thought he said convicted. Then I had it wrong.

Mr. Kay: Well, we will check the record on that. I am of the same impression as your Honor. [406]

The Court: Well, 65-5-63 provides no sentence—yes, it does.

Mr. Faulkner: The other one doesn't.

Mr. Kay: Well, in other words, the——

The Court: 65-5-63 provides the punishment for embezzlement.

Mr. Kay: It refers only to the punishment section of it; that is all.

Mr. Faulkner: Yes. That is what he was talking about.

Mr. Kay: Well, in other words, Olson was convicted under 7-1-9. That is the statute he violated. He didn't violate the punishment section of 65-5-63. He was sentenced under it. He was punished.

Q. (By Mr. Kay): Mr. Daum——

Mr. Kay: I am sorry.

The Court: Under the Section 7-1-9 there provides no punishment, but under Section 65-5-63 there does, so that the statement of the witness, if he so stated, that Section 65-5-63 is the one under

(Testimony of Jack D. Daum.)

which he was sentenced, the Court was in error, and that is the Court's ruling.

Q. (By Mr. Kay): Is that your testimony now, Mr. Daum? A. It is now, and it was then.

Q. And this—then it is that you and Mr. Moore were discussing only Section 65-5-63; is that right? [407] A. Yes, sir.

Q. You did not discuss Section 7-1-9?

A. As a matter of fact, we didn't discuss it. He pointed this out to me, where the parallel was between them.

Q. In 65-5-63? A. Yes, sir.

Q. Well, now, the only reference in the Olson case to 65-5-63 was with regard to the sentence to be imposed?

A. Well, I don't know that, Mr. Kay. I mean, I am no lawyer. He just pointed it out.

Q. If that be true, Mr. Daum, are we to assume that you and Mr. Moore were discussing what sentence would likely be imposed on the Governor—

A. No, sir.

Q. —and the Treasurer—

A. No, sir.

Q. —and the Highway Commissioner?

A. No, Mr. Kay. We were discussing the parallel between the cases.

Q. The parallel between the cases; but the only parallel, the only reference as to this section, in the case of Oscar Olson is to the punishment for embezzlement, the imprisonment. It has nothing whatever to do with this case.

(Testimony of Jack D. Daum.)

A. I was not aware at the time and up until now I haven't [408] been aware that there was any other section involved in this case. Mr. Moore pointed this section out and said that is the same one that Oscar Olson violated and the one under which he was sentenced, and there is the parallel right there.

Q. Well, in view of the Judgment and Sentence it is obvious, is it not, that Mr. Moore was mistaken as to the section under which Mr. Olson had been convicted—had been convicted? I am not trying to confuse you.

A. I never said that he was, and I don't believe Mr. Moore ever told me that he was convicted under that, although he pointed out the parallel in this statute, and that is the basis on which I reported that he said there was a parallel, that and the fact that the funds were handled the same way.

Q. Now, so——

Mr. Kay: Let me see that Section 65.

Q. (By Mr. Kay): Did Mr. Moore point out to you the provision, in your discussion did Mr. Moore discuss the provision of 65-5-63 that he felt Mr. Olson had violated?

A. That Mr. Olson had violated?

Q. Yes.

A. No, sir. He just pointed out——

Q. Well, did he discuss the section that he felt Mr.—that the Highway Board had violated, the provision of it? [409]

(Testimony of Jack D. Daum.)

A. Yes. He pointed out this section. He said the same section holds.

Q. Point out which portion of the section that he referred to when he was discussing this law with you?

A. Well, as I remember—Mr. Kay, this was three years ago, and to take a section apart three years after it was pointed out to me—but, as I recall, the parts that he pointed out was——

Q. Take your time and read it.

A. Yes. “That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation, or in which said Territory, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required”—that is the section, that is the part of it, that the loaning of the money and the “neglect or refuse to pay over any portion thereof as by law directed and required.”

Q. Mr. Moore pointed out this to you, did he, that in his opinion the law had been violated in this instance by [410] lending the money?

A. He pointed out the loan and the neglect to pay over as required and then showed me the stat-

(Testimony of Jack D. Daum.)

ute on the 12-2-1 that provides that the money should go into the general fund.

Q. Now, that is the manner in which Mr. Moore and you determined that Section 65-5-63 had been violated; is that correct?

A. That is where we drew the parallel from.

Q. The parallel. Well, now, in the Oscar Olson case was Mr. Olson convicted for loaning any Territorial money?

A. Sir, I don't know. I don't know. I am not familiar with the details of the case.

Q. You don't know? Weren't you in the Territory when Oscar Olson was convicted?

A. What year was that?

Q. 1950.

A. Yes, sir; I was in Fairbanks.

Q. You were working for the Fairbanks News Miner, were you not? A. Yes, sir.

Q. You reported the case of Oscar Olson rather fully, did you not?

A. No, sir. That was an Associated Press story.

Q. Well, you read it, didn't you? [411]

A. I imagine I did; yes, sir.

Q. Well, you, as a matter of fact, know of your own knowledge that Oscar Olson was convicted of converting the money to his own use, pocketing it, making away with it?

Mr. Faulkner: Just a minute. I think counsel is going a little astray here. The judgment in that case speaks for itself——

(Testimony of Jack D. Daum.)

The Court: The judgment doesn't recite the——

Mr. Faulkner: ——whether he stole any money or converted it to his own use.

Mr. Kay: I am asking if he didn't know that.

The Court: I think the question is quite proper, as to whether the witness knew that or not.

Mr. Kay: Certainly.

The Court: The objection is overruled.

Q. (By Mr. Kay): Did you know that?

A. What?

Q. That he was convicted of stealing and pocketing Territorial money and converting it to his own use?

Mr. Faulkner: Just a minute. I must renew my objection. Now he is asking the witness if he knew something that isn't in the judgment. The judgment is the best evidence of those things and it was introduced here.

The Court: The Court will take judicial notice of the fact, counsel, that the judgment and sentence in a [412] criminal case does not recite the whole language of the offense charged but only the title of the offense charged, which is done in this exhibit. Therefore, the question is proper as to what this defendant knew at the time of writing this article.

Mr. Faulkner: That he knew something that isn't so according to the judgment? It doesn't appear there.

The Court: The objection is overruled.

Q. (By Mr. Kay): You may answer the question, Mr. Daum.

(Testimony of Jack D. Daum.)

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The Court: The objection is overruled.

Q. (By Mr. Kay): You may answer the question, Mr. Daum.

(Testimony of Jack D. Daum.)

A. Whether or not I knew that Mr. Olson had stolen money from the Treasury?

Q. Yes, sir.           A. Yes, sir.

Q. You knew that, didn't you?

A. Yes, sir.

Q. When you drew this parallel, you knew that?

A. Sir?

Q. When you drew this parallel on September 25, 1952, you knew that?

A. I knew that he had stole the money; yes, sir.

Q. Now, you have stated that you wrote the editorial appearing on the front page, Mr. Daum, "Start Talking, Boys"?

A. Yes, sir.

Q. May I ask if you had any communication with Oscar Olson prior to writing that story, that editorial? [413]

A. With Mr. Olson?

Q. Oscar Olson—Oscar G. Olson?

A. No, sir.

Q. In the last paragraph of your editorial you state: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings." That was perhaps your editorial license as to what you thought Mr. Olson might be thinking; is that right?

A. That was a fair assumption; yes, sir.

Q. You didn't; you had no direct knowledge of what Mr. Olson might be thinking at that time, had you?

A. No, sir.

Q. Your intention in writing that paragraph was to compare Oscar Olson to Gruening, Roden and Metcalf in that respect, was it not, Mr. Daum?

(Testimony of Jack D. Daum.)

A. No, sir.

Q. Was it not your intention, sir, when you—the immediately preceding paragraph reads as follows—and the whole editorial is devoted to this Chilkoot Ferry fund——

A. Yes, sir.

Q. ——and to the part played in the Chilkoot Ferry fund by Gruening, Roden and Metcalf?

A. Yes, sir.

Q. And, in fact, the preceding paragraph reads as follows: [414] “But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught.”

A. Yes, sir.

Q. “Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings.”

A. Yes, sir.

Q. Now, do you state that it was not your intention to relate Oscar Olson, thinking that Territorial laws were only for the underlings, to Gruening, Roden and Metcalf in that respect?

A. Not to them as persons; no, sir.

Q. Well, to them as what?

A. To the idea involved. The story itself relates the persons and the dates and the events. The editorial tries to point out the ideas and principles that are explicit in this story, the fact that here are public officials—I don't care who they are—public

(Testimony of Jack D. Daum.)

officials disregarding the normal methods of handling money in the way the law provides and failing to account to the public for the way that money is being handled. Oscar Olson is [415] a good example of that principle of public officials forgetting their duty towards the public and forgetting the fact that they have to account to that public for every penny of Government money that is in their hands.

Q. Well, then, the point was that you considered, as I gathered from your explanation there, that you considered, and intended for the reader to understand from that, that Gruening, Roden and Metcalf, as Oscar Olson, thought Territorial laws were only for the underlings; is there any other interpretation that can be drawn from it?

A. Their actions in this case.

Q. Were comparable to those of Oscar Olson?

A. No, sir. Let me say it, sir. Their actions in this case pointed up once again that the public must ever be alert to public officials who feel that they can conduct their office to please themselves without bothering with all the red tape that has been set up by society to protect that money.

Q. Well, is it your impression that Oscar Olson was convicted for disregarding red tape?

A. Red tape; considerable red tape; yes, sir.

Q. Oscar Olson was, as you have admitted, convicted of a theft of public funds, was he not?

A. Through misuse of his office. [416]

Q. The theft of public funds by misuse of his office?

(Testimony of Jack D. Daum.)

A. Yes, sir. If the misuse was—if he had not misused his office or abused the rights that the public had given him, the theft would not have occurred. The principle comes before the act.

Q. I believe you testified, did you not, that the use of the word “Private” in your subheadline here “Diverting Cash to Private Bank Account”—I missed your explanation of what you meant by the use of the word “Private” in that respect.

A. Private as opposed to public, a public bank account being the Treasury.

Q. I see. Well, you realize that all the funds of the Territory are kept in bank accounts throughout the Territory, do you not?

A. Yes, sir; but under the Treasurer.

Q. The Treasurer was a member of the Board of Road Commissioners in this case, was he not?

A. Acting as a member of the Board of Road Commissioners; yes, sir.

Q. True. And this was—the money was in a bank in the same sense and in the same manner as the rest of the Territorial funds, the funds of the Territory, was it not?      A. No, sir. [417]

Q. In your interpretation?

A. No, sir. The rest of the money had been turned into the general fund and had gone through the Treasurer’s Office and had been accounted for.

Q. But money that is in the general fund is actually on deposit in banks, is it not? We don’t have a vault for the Treasury, do we?

A. I don’t know, Mr. Kay. I realize that some Territorial monies are kept in banks; yes, sir.

(Testimony of Jack D. Daum.)

Q. Isn't all money in the general fund or substantially all the money in the general fund kept in banks; or do you know, sir?

A. I don't know, sir.

Q. Now, in your—just one more item, Mr. Daum—I have in my notes that you testified on direct examination that there was nothing particularly unusual about the size of headline?

A. No, sir. We have both larger type and smaller type.

Q. Can you recall—how long were you with the Empire, Mr. Daum?           A. Altogether?

Q. Well, I know you came there in—September?

A. From the time I came there in September—September, October, November, December, January, February, March, April—I believe I left in May—nine months. [418]

Q. During that time can you recall any other story in which you used as large or larger type?

A. Yes, sir.

Q. Name one.

A. Well, there was the Presidential election shortly after this that we used larger type.

Q. Larger type?

A. I believe so. I am not certain but I think the Empire used larger type on the sinking of the "Kathleen" shortly before this.

Q. You were not there on the sinking of the "Kathleen"?

A. I arrived the day after the sinking. The

(Testimony of Jack D. Daum.)

story appeared the day I arrived. I can't recall any other specific stories, but I know we had larger type.

Q. How about the Yankees winning the world series? You didn't use nearly as large type on that, did you?

A. Just about the same. It appears to be about two or three points more. I think one is 96 point and the other 104. I am not certain. Just about the same size. About six points smaller.

Q. Well, then, I take it that you consider in your opinion, that is the opinion of you as setting the policy of the Empire on this day, that the stories and editorials on the special ferry fund were a larger and more important news story than the Yankees winning the world series? [419]

A. Yes, sir; in that they dealt with a more important principle than the principle of baseball.

Q. You testified that you believe that you used larger type on the Presidential election?

A. I believe so.

Q. Now, as a matter of fact, Mr. Daum, are you sure that the Empire has any larger type?

A. Yes, I am positive we have larger type. I am sure you will find larger type in that same paper, display type.

Q. Larger type? A. Larger type; yes, sir.

Q. Than that, than the headline in that paper?

A. I believe so.

Q. I would be very appreciative if you could

(Testimony of Jack D. Daum.)

find me an example of it at any time, Mr. Daum, at your convenience.

Mr. Kay: I have no further questions.

Redirect Examination

By Mr. Faulkner:

Q. Now, Mr. Daum, just one or two questions. On the issue of the Empire of September 26th, a portion of which counsel has introduced here in evidence, I will hand you the whole front page of the paper of that day and ask if you are familiar with that? A. Yes, sir. [420]

Q. And are you familiar with the article there attributed to Mr. Roden? A. Yes, sir.

Q. In large type? A. Yes, sir.

Q. Do you know whether that is correct? This quotes Mr. Roden. Did you write that?

A. I wrote that story; yes, sir.

Mr. Faulkner: We will offer this in evidence, this whole front page in evidence.

Mr. Kay: I wonder if we can just glance through it for a moment here?

Mr. Faulkner: Yes, I don't know what else——

Mr. Kay: No objection.

Mr. Faulkner: We will offer this in evidence. Does the Court want to see it?

The Court: No. It may be admitted.

Mr. Faulkner: That will be——

The Clerk: M.



(Testimony of Jack D. Daum.)

Mr. Faulkner: —defendant's Exhibit M.

The Court: I did not quite get what it is.

Mr. Faulkner: He said it was an interview with Mr. Roden or a statement by Mr. Roden.

The Court: The same as referred to in the Independent, or another one? [421]

Mr. Kay: Your Honor, I introduced just a clipping from the paper, two clippings from the paper.

Mr. Faulkner: From this front page; and I want all of the front page.

Mr. Kay: This is the full front page, and it shows the position and everything else.

The Court: Well what I wasn't clear on was, is this supposed to be the same interview?

Mr. Faulkner: I don't know whether it is the same or not. I don't think it is quite the same.

Mr. Kay: The next day's story anyway.

Mr. Faulkner: This one was written two weeks before the other one was.

Q. (By Mr. Faulkner): Mr. Daum, you say that that is correct, this story in the issue of the Empire of September 26, 1952? A. Yes, sir.

Q. And you had quite prominent headlines on that? A. Yes, sir. I played it high.

Mr. Faulkner: That has been introduced now. I will show it to the jury.

Mr. Nesbett: What exhibit is that?

Mr. Faulkner: Exhibit M.

Q. (By Mr. Faulkner): Mr. Daum, at the time you wrote these articles did you know—don't go into the extent—but did [422] you know that the ferry fund was short?

(Testimony of Jack D. Daum.)

Mr. Kay: I object to that as assuming a fact not in issue.

Mr. Faulkner: It is in issue I think. It has a bearing on the story, certainly.

The Court: The objection is overruled. It doesn't assume a fact. He is asked whether he knows That is material.

Mr. Kay: He assumed that to be a fact.

The Court: I think not, counsel. The objection is overruled.

Q. (By Mr. Faulkner): Do you know whether the ferry fund was short?

A. I didn't know; no, sir. There had been, well, rumors, suspicions and beliefs that something was wrong with this ferry fund and with a little investigation by the U. S. Attorney it would turn up either shortages or errors in the fund.

Q. Now, a complaint was made as to the reference there in this article to the District Attorney. Was that the reason you referred to the District Attorney in the article?

A. Yes, sir. I had called him and asked him if he was going to investigate this ferry fund, and he said that he didn't know at that time, I believe, and I asked him, [423] "If you don't take action, who else would?" And he said, "I am the only one that would take action because I am the only—I am the one who prosecutes Federal and Territorial Treasurers."

Q. Well, don't repeat the conversation. That is the reason you referred to him in the article?

(Testimony of Jack D. Daum.)

A. Yes, sir.

Q. Now, Mr. Daum, you referred this morning to the policies of the four papers—I think you referred to them, didn't you, as the Ketchikan News, the Juneau Empire and the Fairbanks News Miner; and what was the other one?

A. Anchorage Daily News.

Q. Anchorage Daily News—with reference to public affairs generally, I think. What did you mean by that? Mr. Kay asked you some questions about it.

Q. Mr. Kay asked me if the policy of those papers weren't the same, and I assured him that the policies were the same, and Mr. Kay attempted to have me say, or, rather, asked me whether or not they were the same in relation to opposing Mr. Gruening and his administration.

Q. Now, what did you mean by those policies being the same?

A. Our policies were the same in that each one of those papers was not afraid to publish any criticism of the administration for fear of reprisal, and we took every opportunity—— [424]

Mr. Kay: I object to that, your Honor, and move that it be stricken. There is nothing in evidence that would justify that at all. The witness is being invited to make a self-serving declaration of some kind here which, I think, is entirely irrelevant.

The Court: He was asked concerning the policy of the paper. He certainly may state his view of

(Testimony of Jack D. Daum.)

the policy of the paper. I can't find that it is self-serving.

A. Well, what I am trying to say is that our policy was not against Mr. Gruening. The policy was to watch closely the acts of the public officials, no matter who was in or of what political hue, and to publish the facts concerning their acts in office, especially when those acts were contrary to the public interest. I might add that those newspapers which took that view suffered considerably by lack of receiving Territorial contracts and printing and advertising and in the shortage of news from the Territorial capital.

Q. Now, Mr. Daum, Mr. Kay asked you also about editorializing in the news. You said Mrs. Monsen had called your attention to one case where you had editorialized. Now, what do you mean by editorializing in the news?

A. Well, in that one instance I meant placing the quotation marks around the words "road inspection trip" for the purposes of showing that, well, the editorializing does [425] not necessarily mean that you are injecting your own thoughts into the article but rather you are showing the whole truth of the matter, so that to place the road inspection as being Mr. Gruening's explanation of his trip, and adding that it is the eve of the Territorial elections without commenting on it, and let the public judge for themselves whether there is any connection.

(Testimony of Jack D. Daum.)

Q. Yes. Well, were you on the Empire, working for the Empire, in November, 1952?

A. Yes, sir.

Q. Do you recall the strike, that steamship strike, that was in that month, that tied up the steamers for three or four weeks? A. Yes, sir.

Q. Do you recall various news items there, over the course of a few days, stating that certain head officials of the Territory were absent from the Territory at that time?

A. Yes, sir; at one time we had four or five—yes, sir; I do recall that.

Q. And maybe I can refresh your memory, if it is permissible. The Governor was away, was he?

A. Yes.

Mr. Kay: I object.

Mr. Faulkner: I will withdraw that question.

The Court: I cannot see—well, you have withdrawn the question.

Q. (By Mr. Faulkner): Now, do you know what happened there in the absence of these officials with reference to the strike? A. Yes, sir.

Mr. Kay: Is this relevant? I object again.

The Court: Again, I see no relevancy.

Mr. Faulkner: He talked about editorializing, and I want to bring out just what editorializing is in the news and what the duty of a newspaper is. I think the jury is entitled to know.

The Court: I think he has explained that.

Mr. Faulkner: Well, I don't think he explained it as well as he can.

(Testimony of Jack D. Daum.)

The Court: Well, is it necessary, counsel, to go into the details? Cannot that be explained in general terms as he has done?

Mr. Faulkner: Just one instance, your Honor, and I want to show——

The Court: If you wish to show an illustration of what he calls editorializing, you may do so.

Mr. Faulkner: I want to show an instance, yes; it isn't an instance; it is an illustration based on facts.

The Court: Very well. [427]

Mr. Faulkner: All right.

Q. (By Mr. Faulkner): Now, Mr. Daum, you know what happened there; I mean, with reference to this strike? A. Yes, sir.

Q. What was it?

A. Well, the officials in the Territory—the Governor, the Attorney General, the Highway Engineer, the Treasurer—I don't know whether the Treasurer was absent or not—but at any rate they were all absent from the Territory during this strike, and there was nobody, the Governor nor the Attorney General, to take action against, or to take positive action in getting this strike stopped and getting the flow of supplies coming to Alaska, so the Chamber of Commerce in Juneau took it upon itself to hire an attorney to go to Seattle and attempt to obtain an injunction against the strikers.

Mr. Roden: That is not true.

Q. (By Mr. Faulkner): Now, referring to that, Mr. Daum, is that the type of matter that you think

(Testimony of Jack D. Daum.)

the paper should editorialize on when they publish this news?

A. I believe that would have been a very likely case for a paper to editorialize and point out where the fault lay in the Territory not being able to take any action.

Q. Isn't that—that is a duty of a paper, isn't it?

A. I would say so; yes. [428]

Mr. Faulkner: I think that is all, Mr. Daum.

### Recross-Examination

By Mr. Kay:

Q. Well, Mr. Daum, would you say that that would be, this example Mr. Faulkner has given you, would be a fit place for editorializing in the news columns? Is that what you meant to imply?

A. It would have been an example of what I was trying to say. To merely say that a strike is on and that the Chamber of Commerce is taking action, isn't telling the entire news, and yet it could be construed as editorializing to say the strike is on and there are no Territorial officials here to take action and the Chamber is taking action.

Q. Well, as long as—it would be in fact editorializing? A. Yes, it would be.

Q. In the news column? A. Yes, sir.

Q. There might be a difference of opinion on that. Is it a matter of fact that officials were absent or that all officials were absent who could have taken action?

(Testimony of Jack D. Daum.)

A. Well, the Governor and the Attorney General were absent.

Q. Wasn't the Secretary of Alaska the Acting Governor?

A. I don't recall whether he was present or not. [429]

Q. Well, now, is it your testimony that the Secretary of Alaska was absent from Alaska at the same time the Governor was, at that time?

A. That is not my testimony; no, sir.

Q. It is not a fact, is it?

A. I don't know, sir.

Q. Treasurer Roden is the man who went down to settle that strike, isn't he?

A. I believe Mr. Roden is the man that the Chamber sent down; yes, sir.

Mr. Roden: By the Territory.

Q. (By Mr. Kay): Did he go as a Chamber delegate, or did he go on behalf of the Territory?

A. I don't know. Mr. Roden just said he went on behalf of the Territory. I will take his word for it.

Q. You said in response to a question of Mr. Faulkner's that, although you had no knowledge of whether or not there was any shortage in this particular fund, that there were rumors and suspicions about it at the time. Does that mean that there was such rumor and suspicion before September 25, 1952, at the time you wrote this story and editorial?



(Testimony of Jack D. Daum.)

A. No, sir. Did you say that there were rumors or suspicions or such?

Q. Prior to September 25, 1952? [430]

A. Well, what I meant was that Mr. Moore told me that there would probably be more come out of this than—he wanted to audit the fund, and I asked him why he didn't just go over and audit it, and he said, "Up until now I haven't even officially known that it was there, but once that fund is audited you can bet that there is probably going to be more come to light than at present."

Q. In other words, Moore was sure of the fact that he would uncover something when he audited it? A. Not certain; no, sir.

Q. But "be sure," isn't that the words you used?

A. There was a suspicion there.

Q. You say that Mr. Moore told you he hadn't known anything about the fund before that?

A. He said he had not been officially apprised of it; he did not officially know of it.

Q. And he said that that was his reason for not having audited it?

A. I believe that is about right.

Q. So that, if Mr. Metcalf testified that he asked Mr. Moore within a few days after the meeting of June 5, 1952, to assist in setting up books for this fund, and that he twice requested audits from Moore of the fund, Moore would have been mistaken; either Moore or Metcalf would have been mistaken about that? [431]

A. I wouldn't say that; no, sir. I don't know.

(Testimony of Jack D. Daum.)

Q. If that is true, it wouldn't reconcile with what Moore told you or gave you to understand at that time?

A. Mr. Kay, I don't recall Mr. Moore's exact words enough to contradict Mr. Metcalf, or either way on that.

Q. Did any other rumor or suspicion come to your attention prior to the publication of these articles on September 25th?           A. No, sir.

Q. Other than Mr. Moore's?

A. Except from Mr. Homer, when he said that chances are—he said to be sure and—something about “You want to check into this ferry deal. There is a lot going to—that is going to break wide open” or some such thing.

Q. Was that after Mr. Homer had been discharged?

A. I don't know. It was about a week or ten days before the article was written.

Mr. Kay: That is all.

Mr. Faulkner: That is all, Mr. Daum.

The Court: We will take a recess at this time for five minutes.

Mr. Faulkner: Oh, pardon me, your Honor. We are finished with Mr. Daum, and I wonder if counsel objects to his remaining here. Everybody else seems to be here on the other side. [432]

The Court: If he is not to be recalled.

Mr. Kay: If he is not to be recalled, I have no objection at all.

Mr. Faulkner: Well, I have nothing in mind now. I don't know what might transpire.

The Court: Well, the rule of exclusion of the witnesses may now be waived as to Mr. Daum.

Mr. Faulkner: Unless something comes up—I don't believe there will be.

(Witness excused.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Faulkner: If the Court please, our next witness will be Mrs. Monsen, and the plaintiffs took Mrs. Monsen's deposition in Juneau, and it will be quite a strain for her to be on the stand and go all through this again, and I have cross-examined her very little in that deposition, but I would like to read the deposition and I think that will shorten the time and get in most of her evidence.

The Court: I believe the rules do not permit the deposition to be used unless the witness is not within one hundred miles of the place of trial. Now, unless counsel wish to waive that, that is the way I understand it. [433]

Mr. Faulkner: Do you mind if I read these questions and answers?

Mr. Nesbett: No. Your Honor, I told Mr. Faulkner when we took it that it could be read, although he assured me she would be here and would take the stand.

Mr. Faulkner: She will. She will take the stand, but we agreed that this could be read by either party, but, as I say, it is unusual for the Court to have the witness here and read a deposition at the same time, but, these questions, I don't want to have to go over the same ones again, unless counsel does, and——

Mr. Kay: It being understood that we are not limited on our cross-examination?

Mr. Faulkner: Oh, no.

Mr. Kay: All right.

Mr. Faulkner: No, not at all.

The Court: Very well. Then it is understood that the rule which we just referred to is waived, except that Mrs. Monsen may be called for further examination.

Mr. Faulkner: Yes. We agreed to that when we took the deposition.

The Court: Very well.

Mr. Faulkner: I will read the questions and answers.

(Whereupon, the deposition of Helen Monsen was read as follows by Mr. Faulkner:) [434]

Mr. Faulkner: This deposition is taken, it says here, pursuant to stipulation, so that is all right.

(Reading.)

### Proceedings

Mr. Nesbett: The deposition of Mrs. Helen Monsen is being taken in connection with all three of

the consolidated actions pursuant to stipulation of counsel representing the plaintiffs and of counsel representing the defendant for the purpose of this deposition only.

Mr. Faulkner: All right.

MRS. HELEN MONSEN

being first duly sworn upon oath, deposes as follows:

By Mr. Nesbett:

Q. Mrs. Monsen, you were the President of the Empire Printing Company on September 24, 1952, were you not? A. Yes.

Q. And you still are the President of that corporation, in the process of being dissolved?

A. Yes.

Q. And on September 24, 1952, did you hold an official position in the printing company?

A. Yes.

Q. Were you actively engaged in the activities of the printing company and in the printing of the Daily Alaska [435] Empire? A. Yes.

Q. Now, how long prior to September 24, 1952, had you supervised the activities of the printing corporation?

A. That I have to think about. I presume that would go back to 1938. There is a period when I was away from Juneau, but it was always under my supervision. The work was carried on by the staff.

Q. In your capacity as President, Mrs. Monsen,

(Deposition of Mrs. Helen Monsen.)

you hired and discharged, if necessary, your editors, did you not?      A. I did, yes, I presume.

Q. On September 24, 1952, did you have employed on the Daily Alaska Empire a man named Beard?      A. Yes.

Q. And what was his position with the Empire Printing Company?

A. I don't know what it was at that time. He had been Business Manager; he had been Manager; he had been Editor and Manager, and I don't know what it was at that time. If you want me to look it up——

Q. No, that won't be necessary. Is it a fact that as of that time, September 24, 1952, Mr. Beard did have an executive position with your paper, did he not?      A. Yes, I think so.

Q. Is it true that under your supervision he supervised the [436] make-up and printing of the Daily Alaska Empire?

A. I don't know whether he was on the desk then or whether Jack Daum did it. I could find out.

Q. He was, however, engaged in——

A. He worked in both the front office and the business office and in a small town daily, one just goes ahead and does what has to be done every day.

Q. Would you say then that Mr. Beard on that date had considerable authority nevertheless, in an executive capacity?      A. Yes.

Q. Did you on that date, September 24, 1952, have a Mr. Daum, D-a-u-m, working for you?

A. Yes.

(Deposition of Mrs. Helen Mosen.)

Q. Can you state what his official capacity was?

A. Well, I don't know whether he was reporting then or whether he was on the desk at that time. Sometimes he made up the paper; sometimes he reported. I know that that day he did get the story that is involved in this case.

Q. Now I show you, Mrs. Mosen, the front page of the Daily Alaska Empire printed on September 25, 1952, the subject of these suits, and if you need it to refresh your memory——

A. Yes. [437]

Q. I will ask you if you had anything to do with the make-up and reporting contained on that page?

A. No.

Q. Mrs. Mosen, did you know what the make-up of the page was going to be on September 25, 1952?

A. No.

Q. Did Mr. Beard or Mr. Daum consult you in any respect concerning the so-called ferry fund?

A. No. I don't know whether we talked about it before or after that. All I knew was what people in town knew, just general information. I didn't know anything about their——

Q. Now, in your general supervisory capacity didn't your Managing Editors and desk men check with you on matters of that nature?

A. I don't know what else I might have been doing at that time. I had a lot of other things to do besides running the Empire. I realize that it was the most important thing I should have been doing, but I certainly was not consulted.

(Deposition of Mrs. Helen Monsen.)

Q. Then is it your testimony, Mrs. Monsen, that you had absolutely nothing whatsoever to do with the items contained on the front page of that paper on September 25, 1952?

A. I might have written some of the stories about the [438] locals, and so on. Those are the things that I usually did, the small items.

Q. Mrs. Monsen, there is an editorial on that page entitled "Start Talking Boys"—

A. Yes.

Q. —that is described in parentheses below as an editorial. Did you have anything to do with the preparation of that editorial? A. No.

Q. Do you know who wrote that editorial?

A. I don't know whether Jack Daum did or whether Jim Beard did.

Q. Who ordinarily wrote your editorials?

A. Either one of them. Very frequently I did, but this is something that I hadn't done.

Q. Then is it your testimony that you first learned that that editorial, "Start Talking, Boys," was to be printed, was when the paper came out on September 25? A. After it came out: yes.

Q. That paper you do hold in your hands is the front page of your paper as of that date, is it not?

A. It apparently is.

Q. Mrs. Monsen, did Mr. Beard or Mr. Daum have any instructions from you concerning their editorial or news reporting policy with respect to the Gruening administration? [439]

A. No. I know what you are referring to, be-



(Deposition of Mrs. Helen Monsen.)

cause I have seen the notes on Mr. McFarland's deposition and——

Q. The answer is "no"?           A. No.

Q. You have not instructed them in any fashion whatsoever respecting the attitude they were to reflect in your paper concerning the Gruening administration?           A. No.

Q. Well, Mrs. Monsen, I will ask you whether or not you knew about this so-called ferry fund prior to the date of publication of September 25?

A. That I don't know. I don't recall whether it was generally known at the time or not. I just don't know. If it was generally known, I presume I did.

Q. Isn't it a fact then, Mrs. Monsen, that you carried an extreme dislike for Governor Gruening personally?           A. No.

Q. Isn't it a fact that you instructed Mr. Daum and Mr. Beard that they were to do everything possible to expose or embarrass the Gruening administration?           A. No.

Q. Did you not instruct them at any time concerning their attitude with respect to Gruening?

A. No.

Q. You have read Mr. McFarland's deposition, have you not? [440]

A. Yes. By the way, Mr. McFarland was employed when I was out of town. Now, I don't know what Mr. Beard may have told him.

Q. Do you deny that you ever on any occasion instructed Mr. McFarland with respect to his edi-

(Deposition of Mrs. Helen Monsen.)

torial and/or news reporting policy with respect to the Gruening administration?

A. I don't deny that. I know what he is referring to, is the article about Mr. Gruening—it was an interview with Mr. Gruening, I believe, when he came back from attending the Democratic National Convention, and Mr. Gruening had come out at the Convention in favor of Kefauver and when he came back to Juneau, in his first interview, apparently he told Mr. McFarland or Mr. Jensen—whoever was covering the office then, I don't recall which one—oh, just a very fancy story about how he was for Stevenson and how Stevenson was the finest man to have been nominated, and so on. I did not see that paper, by the way, until it was on the street. Someone stopped me on the street and said “Are they trying to use the Empire, Helen?”

Q. Well, Mrs. Monsen, don't quote what someone on the street might have said.

A. I can tell you who the man was.

Q. That still doesn't make it admissible if I object to it. [441]

A. All right. Well, anyway, that is what made me go back to the office to read the paper and find out what had been put in. I didn't object previously. They got the story in, and they let Mr. Gruening use them, use the Empire, for his ends. All he wanted to do—this is a presumption on my part, but I think I know the man pretty well—was to get a story in the Empire that he could cut out and send back to Democratic headquarters and say

(Deposition of Mrs. Helen Mosen.)

“see,” and that is what Mr. McFarland had managed to do for him.

Q. Your Managing Editor, Mr. McFarland, printed that report of what went on at the Democratic Convention, didn't he?

A. What do you mean?

Q. Mr. McFarland printed the report Mr. Gruening gave of what occurred at the Democratic Convention?

A. He was giving—he had already come out for Mr. Kefauver, but then he wanted a record—it was in the A. P. dispatches when he was back at the Democratic Convention, but he wanted the record changed, don't you see, to make him a supporter, not of Mr. Stevenson, who was a candidate at this time that he was supporting Kefauver—he wanted to indicate that he was a Stevenson supporter; that the best man had been chosen.

Q. Of course, there is nothing wrong with supporting the man who is finally nominated, as far as party politics goes, [442] if you are going to have to put up with him, is there?

Now, after you saw this report of Governor Gruening as to what transpired at the Democratic Convention——

A. It wasn't a report of what transpired at the Democratic Convention.

Q. Did you talk with Mr. McFarland about what he had done?           A. Yes, I did.

Q. And didn't you as a matter of fact bawl him out for doing it?

(Deposition of Mrs. Helen Monsen.)

A. I told him that I had been met on the street and that I had been bawled out first for letting people use me, and that——

Q. Well, just answer the question. Did you bawl Mr. McFarland out for doing it?

A. No, I just told him what had transpired, that I had been bawled out down the street for letting my staff and Mr. Gruening use the Empire.

Q. Didn't you tell him that you had never known that your newspaper would report anything like that as coming from Governor Gruening?

A. No, I don't think I did.

Q. Didn't Mr. McFarland, as the result of that interview with you, offer to quit his position?

A. Yes; but by the way, he was already, apparently, to start another paper—he and Mr. Gruening, I had been [443] told, were all ready to go on a paper of their own, so that's why—he didn't quit on my account.

Q. Did he quit or was he fired?

A. He was not fired.

Q. Do you recall when he left the employ of the Daily Alaska Empire?

A. No; I can find out, though.

Q. Did you not, on another occasion, have a severe argument with Mr. McFarland over his reporting certain news items received from Associated or United Press in connection with the Palmer airport?

A. I don't know. Most of the Palmer airport

(Deposition of Mrs. Helen Monsen.)

stuff was before Mr. McFarland's time. I haven't any idea.

Q. Do you recall one incident after Mr. McFarland was working for the Empire, concerning the Palmer airport?

A. I would have to look it up, go through the papers. Most of my memory of that, the Palmer airport, is two years before this, practically before he came to work for us. I do recall an argument with Mr. McFarland up at my house in 1951 when Mr. Spencer and Curtis Shattuck were there. This was after Korea, and Mrs. McFarland and Mr. McFarland, but especially Mrs. McFarland, were quite bold in calling the United States the aggressor nation in the war and so on and so forth.

Q. Not concerning Gruening and the news policy in the [444] Empire?

A. Yes; this is indicating that Mr. McFarland or—the Empire has tried to maintain a conservative—well, let's see, the Empire wouldn't call the United States an aggressor nation, but the McFarlands called the United States the aggressor nation in the Korean War. Does that mean anything?

Q. No, not to me it doesn't, Mrs. Monsen.

A. I mean that indicates why I might have had an argument with Mr. McFarland over something like that. That indicates what his feelings were.

Q. Your father was formerly Governor of Alaska?      A. Yes.

Q. And you were more or less his secretary up to the time of his death, were you not?

(Deposition of Mrs. Helen Monsen.)

A. No.

Q. Well, you cared for him constantly and assisted him in his duties as much as you could, didn't you?      A. Yes, I did.

Q. Isn't it a fact that you had the ambition of replacing your father as Governor when the new appointment was made?

A. What? Mr. Nesbett——

Q. Just answer the question.

A. No! [445]

Q. You knew Governor Gruening before he was Governor and was in the——

A. Is that supposed to be one of the things that—I'm sorry, but you can't spring questions like that on me and expect me not to comment.

Q. I have the right to ask them and if you can, you should answer them.

A. Yes, but I mean—I'm sorry.

Q. That's all right.

Isn't it a fact that you knew Governor Gruening before he was appointed Governor and was in the Territorial Insular Affairs Department of the Bureau of Interior?      A. Yes, that is true.

Q. Were you not friendly with him at that time?

A. Yes, we were friends.

Q. You became somewhat, quite a great deal, less friendly after he received the appointment as Governor of Alaska, did you not?

A. No. I think you will find an editorial in the Empire in December, 1939, in which the Empire welcomed Governor Gruening to Juneau with open

(Deposition of Mrs. Helen Monsen.)

arms. The Empire's first choice had been an Alaskan for Governor, and I have forgotten the circumstances, but it seems to me that it was Jim Connors—at that time the Collector of Customs—whom [446] the Empire would have supported, but when it became apparent Governor Gruening was getting the appointment, we were just as anxious to have Governor Gruening have it as anybody else.

Q. Didn't your attitude toward Governor Gruening become markedly less friendly after Governor Gruening had required the Troy estate to refund certain monies paid for the compilation and publication of a book called "Guide to Alaska"?

A. No. Mr. Nesbett, you should ask Mr. Faulkner about that situation, because——

Q. Yes, but the idea here is——

A. I know, but your questions are leading questions in which you are attempting to malign me and there is no——

Q. I am not attempting to——

A. Yes, you are. You are trying to keep me from getting things in the record. You are just trying to get things in the record.

Q. Well, Mr. Faulkner will examine you when I am finished.

A. Well, all right. Mr. Faulkner knows more about that than I do and he knows that that is just another one of Mr. Gruening's little deals to try to bear down on me.

Q. "Another one of his little deals"—what do you mean?

A. Well, to make me unhappy.

(Deposition of Mrs. Helen Monsen.)

Q. Make you unhappy? [447]

A. Yes; but by the way, even so——

Q. Well, you try to state——

Mr. Faulkner: Let her finish, Mr. Nesbett.

A. There is no—well, all the things, personal things and so on, that Mr. Gruening has done or his family have done to hurt me, prick me, and so on and so forth. I know what you want to do. You want to make, oh, develop, this theme that was started with Jack McFarland, that I hated Governor Gruening; I don't hate Governor Gruening. There is not hate in my heart, not even about you, Mr. Nesbett.

Q. Well, you shouldn't hate me.

A. No, but I mean that I am just not that kind of person. I don't like the things Governor Gruening has done to Alaska, and they are completely separate from any personal feeling about him. I think he is a tremendously bright guy, and I don't know, I just don't—you just can't develop any feeling of hatred toward him because there just isn't any. If Mr. McFarland says that I hated Governor Gruening or anybody else, Mr. McFarland is lying there, I'm sorry.

Q. It is a fact, isn't it, that the Empire, at your instructions, for a period of over a year or many, many months, refused even to print the Governor's name, "Governor Gruening," as such? [448]

A. No. I don't know what that was all about, but it occurred when I was in Seattle. At that time Bill Carter was running the paper. He ran a story,



(Deposition of Mrs. Helen Mousen.)

if I remember—Mr. Faulkner might remember—but it seems to me it had to do with the Alaska Juneau, in 1944, when they were closing the mine—I don't know whether that is correct or not, and Bill ran a story, or a part—Mr. Gruening had a cute little habit of sending things down to the Empire late in the afternoon so the stories would get over the radio before they would get into the Empire, and Bill cut the story, shortened the story, and Mr. Gruening was very angry about that and called up Bill and I think he told him—you see, I don't recall; I wasn't there; this is just hearsay—but Mr. Gruening, I believe, said that he never wanted anything of his published again unless it was published in full, and in the course of their conversation I think he said “just don't publish my name” or don't—really his instructions, as I recall.

Q. Didn't he say “I won't give you any quotes, but anything that goes to the Empire will have to be in writing from now on” after the unhappy incident?      A. I don't know. I wasn't there.

Q. Wasn't that Governor Gruening's policy during the latter seven or eight years of his term?

A. I don't know. [449]

Q. Well, wouldn't you know, being in a supervisory capacity most of the time?

A. No; I still don't know.

Q. Well, can you then answer the question I put to you previously: wasn't it the policy of the Empire, at your instructions, not to print the Gover-

(Deposition of Mrs. Helen Monsen.)

nor's name as such, but rather to simply refer to him as the Governor of Alaska?

A. Whatever it was that started this——

Q. Can you just answer the question now?

A. No.

Q. Well, isn't it a fact that the Juneau Empire in printing the list of names of those listed in "Who's Who" deliberately omitted the names of Governor Gruening and Frank Metcalf?

A. No, I am sure they didn't.

Q. Are you sure they didn't?

A. I don't know whether it was done or not, but I am sure they didn't do that. It would certainly not be at my instructions.

Q. Now, as the result of these, as you expressed them, "little deals" of Governor Gruening, didn't you become less friendly toward him in your policy of reporting his official acts and doings?

A. Apparently it just depended upon which official acts. [450] Some things he wanted in the paper. By the way, can I tell about the time he threatened me with libel if we published—in 1947, during the legislature?

Q. Well, it isn't quite responsive to my question. Will you answer that, please?

A. It just depended on what they published. Mr. Gruening loved publicity and he would rather have you say something "agin" him than not say anything at all. I don't know what they did about it. I disapproved of a lot of the things that the so-called "palace guard" were perpetrating, includ-

(Deposition of Mrs. Helen Monsen.)

ing the Palmer airport. I didn't approve of that, nor, I believe, did Congress. I didn't approve of the—I don't believe his fight for statehood was honest. Two people—one was Colonel Olson, and the other was Mr. Rasmusson—told me that. To him statehood was a flag-waving, it was a popularity deal; it was a thing that was popular and that he knew that Alaska couldn't support statehood at this time, but it was something that you had to come out and you had to be for it, and so on and so forth. I want statehood for Alaska, but I don't want it until we can pay for it, and that was definitely a fight between the Empire and Mr. Gruening. He made it personal.

Q. How could Mr. Gruening make it personal when he had no newspaper? [451]

A. Oh, my word; what about the Anchorage Times, what about the Ketchikan Chronicle—

Q. I mean he couldn't make it a personal fight against the Empire through those publications, could he?

A. No, but he made a beautiful little—

(Reading suspended.)

Mr. Faulkner: She was interrupted.

(Reading resumed.)

Q. Well, you don't like the Governor at all, do you?

(Reading suspended.)

(Deposition of Mrs. Helen Monsen.)

Mr. Nesbett: Now, your Honor, I object to that. It isn't a proper, true reading of the deposition that she was interrupted. As a matter of fact, she had a habit of trailing off and stopping, and it isn't proper to interpret that particular bit of testimony as an interruption on my part.

Mr. Faulkner: Maybe not, Mr. Nesbett. I am sorry. There are just some marks there, and the answer wasn't finished. Some of them are like that.

(Reading resumed.)

Q. Well, you don't like the Governor at all, do you?

A. I don't dislike Governor Gruening. I dislike the things he stands for. I dislike what he has done to the Democratic Party in Alaska. I think the Democratic Party in Alaska used to be a good party, but there are a lot [452] of conservative Democrats who feel the way I do.

Q. You feel rather strongly on that point, don't you?

A. No. Don't try to get hatred into this, or malice into this, because there is none, sir.

Q. Well, I was just wondering, as the owner of a large capital newspaper, do you still maintain that you did not instruct your editorial writers and Managing Editors with respect to how you felt? After all, it was your newspaper.

A. In some cases it wasn't necessary, but there was never any instruction, there was never any tell-

(Deposition of Mrs. Helen Monsen.)

ing them, et cetera, and if Jim Beard briefed McFarland, it was done while I was away, and——

Q. If Jim Beard did what?

A. Briefed McFarland—that is what Mac said in his desposition, that Jim had briefed him. He said we had both briefed him, and that is, as far as I am concerned, untrue, because he was employed when I was out of town and what happened then I don't know. Any briefing would have been just this, that the Empire did not approve of what we believed he was trying to do in Alaska.

Q. When you say that the Empire did not approve, you mean you, don't you?           A. Yes.

Q. And your thoughts, attitudes, policies or objections [453] were voiced through your newspaper naturally, were they not?

A. A whole lot was in the paper that I knew nothing about.

Q. But you knew about most of what was printed in the paper, did you not?

A. No, I was away a great deal.

Q. Didn't you dictate any policy in general to your——

A. In most cases it was not necessary, because most of the people who worked on the Empire knew about how I felt about various and sundry things, and I tried to be fair and I tried to publish nothing except what I believed the people had a right to know. That is part of the duty of a newspaper, you know.

Q. When you say in most cases it was not neces-

(Deposition of Mrs. Helen Monsen.)

sary, do you refer to instances in the cases of employees such as Small and McFarland?

A. I don't know anything about—Mr. Small was employed when I was away, too. I don't know anything about the situation there at all.

Q. Mr. Small worked there under you for a considerable period of time, did he not?

A. Yes. He was there. His wife worked for us, his daughter worked for us. I don't know, but he was employed while I was away, and he left when I was away. I don't know why he left. [454]

Q. Well, he was employed most of the time he was there under you, was he not?

A. Not especially under me; no, no; it would be very indirectly. My principal association with the Small family was when we were working together to get the Seattle Symphony up here and my association was on that. That, of course, has nothing——

Q. Was that the only association you had with him?

A. No, let's see—he was there during, as I recall, during the "Princess Kathleen" wreck. I don't remember what else.

Q. Did you work at the newspaper office on September 24, 1952, the day before the paper upon which these actions are based was printed?

A. Golly, I don't know. I presume I did.

Q. You worked there pretty regularly every day, didn't you?

A. When I was in town I did. I didn't have

(Deposition of Mrs. Helen Monsen.)

office hours. I did the things that had to be done, that is, as many of them as I could do; that's all.

Q. What in general were those things that had to be done—in general?

A. Answering letters, trying to figure out the answers to things that came up as they were brought to me—I don't know, just——

Q. Not writing editorials or establishing policies? [455]

A. Sometimes. Sometimes I did and sometimes I didn't. I had written very few until after 1953.

Q. Do you recall the day of September 25, 1952, when this front page I have shown you was printed, don't you, Mrs. Monsen?

A. Yes; I remember the paper was out and by the way, somebody, I think it was Mr. Faulkner, told me that Mr. Small had said that Mr. Faulkner had advised me against printing this. I think Mr. Faulkner will tell you that Mr. Small did not know what he was talking about, because Mr. Faulkner didn't see the editorial until after it was printed either, and Mr. Small was imagining——

Q. Actually, Mr. Small said in his deposition that Mr. Faulkner called you after the paper had hit the streets and advised you that it was libelous.

A. I don't think he did.

Q. Don't you recall receiving a phone call from Mr. Faulkner on the afternoon the paper went on the streets and discussing the matter with him in the presence of John Small?      A. No.

(Deposition of Mrs. Helen Monsen.)

Q. Not over the telephone? A. No.

Q. And you don't know whether such a discussion occurred or not then; is that your testimony? [456] A. No.

Q. It could have, but you might have forgotten it; is that right?

A. I don't think it occurred. Mr. Faulkner would know. My first memory of any talk about it at all was the next day, the next morning.

Q. With whom was that discussion?

A. I think with——

(Reading suspended.)

Mr. Nesbett: "had."

Mr. Faulkner: "had"; yes.

(Reading resumed.)

Q. With whom was that discussion had?

A. I think with——Mr. Banfield came into the office and I came over and talked to Mr. Faulkner about it.

Q. Mr. Banfield came in your office and advised you that it was libelous, did he not?

A. I don't know whether he said that or not. He said it should not have——

Mr. Faulkner: If you don't remember those things, Helen——

A. I don't remember, really and truly. I just know that Norman came into the office and we discussed it, and then I came over and talked to Mr. Faulkner, and that's that.



(Deposition of Mrs. Helen Monsen.)

Q. If you don't want to divulge what transpired between you [457] and your attorneys, all right. I was merely referring to Mr. Small's statement. Have you read his deposition?

A. No, I have not. Mr. Faulkner told me something about it, though, and said that he knew and I knew that I had had no discussion with Mr. Faulkner and consequently John was just completely incorrect. He didn't have any idea about it.

Q. Isn't it a fact that numerous conferences were held in your office over in the Empire between yourself and Mr. Beard on various occasions and Mr. Gilmore of the Canned Salmon Industry and Mr. Marcus Jensen, concerning the policy of the Empire as respected the Gruening administration?

A. No. I think about that, wasn't Mark running for office then? If we had any conversations, it was probably about Mark's candidacy. I would have to look it up to see.

Q. Did you have any conference with Auditor Neil Moore just prior to the printing of the September 25 edition of the Empire?

A. That I don't recall. If there were conferences, they were probably with Jim Beard, but I don't know.

Q. But you frequently did have conferences with Mr. Moore, did you not?

A. Well, I think that is dignifying it. Make it conversations, not conferences. [458]

Q. Quite often in your office; isn't that correct?

(Deposition of Mrs. Helen Monsen.)

A. Neil used to come down and pick up his paper at the end of the day, and he would just come in and say "hello," that would be all.

Q. Mr. Moore was quite opposed to Governor Gruening, was he not?

A. Golly, I don't know whether—something that both Neil and I were distressed about and had been for a long time, and Mark, too, that had been one of Mr. Gruening's pets, was the Union Bank in Anchorage, and we knew that the records, the minutes of the Banking Board, had been changed and that, by the way, never got in the paper. It was just one of those things that probably should have gone in but—

Q. Didn't you consider it your duty to print it?

A. Sure did, but it didn't get in. At the time it came up before the legislature in 1947, Mr. Gruening threatened me with libel if it were published, and I knew nothing about it. I came over here and asked Mr. Faulkner, and at that time the matter had been settled and it was hoped that the Union Bank was once more solvent or that some arrangement had been made to protect the depositors. There was no question of libel about anything that was said at the time.

Q. Why didn't you print it? [459]

A. To protect the depositors of the bank, and there is a law, isn't there, Mr. Faulkner, not about libel but about any story that might start a run on a bank?

Q. False story.

A. Well, then, I am wrong, but that wouldn't

(Deposition of Mrs. Helen Monsen.)

have been a false story. The story was correct.

Q. Did you discuss this publication with Mr. Beard the day that it was made, the publication of September 25, 1952?

A. I don't know. I don't remember. Probably after the paper was out—I don't remember that. I have a faint recollection of him standing in the front office with a paper, but I don't remember.

Q. Then is it your testimony that although the entire front page of the Empire of September 25 was devoted to this subject of the ferry fund and so forth, that you knew nothing about what was going to hit the streets that day in the publication?

A. I would imagine that there was probably a Chamber of Commerce meeting and I didn't get back to the Empire until the paper was nearly out.

Q. Well, ordinarily you would have known, wouldn't you?      A. No, I wouldn't know.

Q. If they are going to devote the entire front page to one subject——

A. No, I wouldn't. I'll bet there are lots of times that [460] the Anchorage Times comes out without Mr. Atwood knowing what is on the front page of the paper, or that the Anchorage News comes out, without Mr. Brown knowing what is on the front page of the paper, and probably in the Ketchikan papers it is different, but I don't know.

Q. But ordinarily if the entire front page is to be devoted to one subject, the publisher or the Editor would know about it, would he not?

(Deposition of Mrs. Helen Monsen.)

A. Probably.

Mr. Nesbett: I believe that is all, Mr. Faulkner.

Q. (By Mr. Faulkner): Mrs. Monsen, I believe there are just one or two questions I will ask you. You mentioned the fact that the Governor, Gruening, called you and asked you not to publish something that happened with reference to the Union Bank. Now, wasn't that a resolution which was offered in the Senate that he was talking about?

A. Yes.

Q. And did he on that occasion tell you that if you published it you would be sued for libel?

A. Yes.

Q. And what did you do then? Did you come to me?

A. I came to you and asked you about this. It had come up on the floor of the Senate, and consequently there would have been no libel in publishing it, because it was [461] privileged material, that is what you called it, isn't it?

Q. That is what I told you. I told you it was absolutely privileged. A. Yes.

Q. But suggested that you do not publish the result of this examination in the Senate because it might cause a run on the bank and the depositors, the innocent depositors, would lose their money. A. That was what you said.

Q. Then when I told you that, did you not call

(Deposition of Mrs. Helen Monsen.)

Governor Gruening and tell him that you had been advised by your attorney that that would not be libel to publish that resolution, but that you were not going to publish it anyway?

A. Yes, I did.

Q. And gave him the reasons? A. Yes.

Q. Now, later on, wasn't that resolution published and printed in the Senate Journal?

A. Yes. That time was one of the times that Mr. Gruening suggested we get together to settle the affairs of Alaska over a cup of tea; yes.

Q. Now, on another occasion long before that did you meet Governor Gruening at the Salmon Creek Roadhouse and have some discussion with him about the policy of running [462] Alaska?

A. Yes; that was in '47. It was the night of the election in 1948, and I remember that because Dan Mahoney and Lucille Mahoney had come by the office and we were wondering if there were any election returns and so forth, and we went to the Country Club for dinner and we were there quite early, and while we were there a large party came in and Mr. Gruening was there and Bob Bartlett and a whole lot of people, anyway, and as we were leaving Mr. Gruening came over to me and asked when we were going to get together over that cup of tea; that "if we could only get together, Helen, we could run Alaska," and Mike Monagle was just

(Deposition of Mrs. Helen Monsen.)

chatting with me and I said "Mike, you stand right here with me. I want you here."

Q. Now, Mr. Nesbett asked you about some money that was paid your father's estate by the Mc-Millan Company, although he did not mention the name, which was afterward refunded. Did you ever hear until today that Governor Gruening had the slightest connection with that?

A. That was the first time I had ever heard Governor Gruening mentioned in connection with it.

Mr. Faulkner: I think that is all.

Mr. Nesbett: I have no further questions. Thank you.

(Reading suspended.)

Mr. Faulkner: And shall I read the remainder of it? [463]

Mr. Nesbett: Yes, please.

(Reading resumed.)

Mr. Faulkner: This deposition was taken on short notice, and I had no opportunity to confer with Mrs. Monsen about it until she came in here to give her testimony, and we will, of course, have the right to call her on the stand, because I want to examine her in chief when the case is on trial.

Mr. Nesbett: This is more for the purpose of discovery.

It was stipulated between the counsel for plain-

(Deposition of Mrs. Helen Monsen.)

tiffs and counsel for defendant that the deposition of Mrs. Helen Monsen may be used on the trial of this cause by either party without objections, and that all objections to the form of the questions and objections to the answers are waived, and that the entire deposition may be read into the record.

It was also stipulated that the signature of Mrs. Helen Monsen to this deposition is waived.

It is further stipulated that notwithstanding the fact that the witness Mrs. Helen Monsen was called by the plaintiffs, the plaintiffs are not bound by the testimony of the witness or any portion thereof.

(Reading concluded.)

Mr. Faulkner: And then the stenographer's certificate, [464] and there appears the signature on the original, I believe. I offer the deposition in evidence now pursuant to the stipulation.

Mr. Nesbett: In evidence, your Honor?

The Court: We had already admitted it in evidence, I thought or presumed, before it was read. I beg your pardon, Mr. Nesbett. Did you have something? What was it you had started to say?

Mr. Nesbett: I was going to say it is not an exhibit in itself to go to the jury.

The Court: No.

Mr. Faulkner: No; it is not an exhibit.

## HELEN MONSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Faulkner:

Q. Mrs. Monsen, will you please state your name?      A. Helen Monsen.

Q. And where do you live      A. Juneau.

Q. How long have you lived in Juneau?

A. Most of my life; since 1913.

Q. And what have you been doing in that time; what do you do; what is your position there, or was in 1952? [465]

A. President of the Empire Printing Company.

Q. Well, that has been gone into in your deposition. I am going to try to avoid repeating those questions as much as I can. You heard the deposition read and that is all in evidence. Now, Mrs. Monsen, first, I want to ask you if you have heard here read and have read over yourself the deposition of a man named John Small?      A. Yes, I have.

Q. Now, in that deposition Mr. Small states that after the publications complained of on September 25, 1952, Mr. Faulkner, your attorney, called you on the telephone in a loud voice and in plain language told you that the articles as published were libelous; is that so?      A. No.

Q. How long have you known Mr. Faulkner.

A. Since I was in high school.



(Testimony of Helen Monsen.)

Q. And have you known him quite well?

A. Quite well.

Q. Seen him very frequently?

A. Frequently.

Q. Practically every day when in Juneau?

A. Yes.

Q. Did you ever know Mr. Faulkner to talk over the telephone in a loud voice to anybody?

A. No. [466]

Q. Did you in all your association with him know him at any time or place to use profane language in any form?      A. No.

Q. Now, you say the testimony of Mr. Small then in that respect is untrue?

A. That is completely untrue. I think anybody who knows Mr. Faulkner would verify that.

Q. Now, do you remember coming to my office the day after the publication of September 25th?

A. Yes.

Q. And talking to me about it?      A. Yes.

Q. And is it a fact that at that time I told you it was not libelous?

A. You told me that it was not libelous.

Q. Now, Mrs. Monsen, your testimony here is that in these publications of September 25, 1952, they were not shown to you and you did not see them until after the paper was out and published; is that right?      A. That is right.

Q. Now, you said in your deposition there that that frequently happened?

(Testimony of Helen Monsen.)

A. It happens in any newspaper office. Very seldom do you see the front page of a paper.

Q. In the past ten years you have been managing the paper [467] there?

A. Yes. Mr. Faulkner, I have been—when I have been away from Alaska—

Q. Well, I was going to ask you that. Have you been manager most of the time in the last ten years?

A. Yes.

Q. Until the spring of 1955? A. Yes.

Q. And then what did you do with the paper?

A. I sold the paper to Mr. Allen.

Q. You sold it to Mr. Allen? A. Yes.

Q. Now, in that period, in that whole period there, ten years or more, you say you have been away frequently?

A. In 1943 Doctor Carter sent me to Seattle because I had a tubercular kidney and it had to be removed, and that took a while; and then later—I hate talking about myself.

Q. Tell us, were you in the hospital and laid up in Seattle under the doctor's advice? A. Yes.

Q. That was after Governor Gruening came then? A. That was in 1943.

Q. And I might ask you, who owns the paper?

A. The Empire Printing Company.

Q. I mean—yes—but who owned it during this time under [468] discussion?

(Testimony of Helen Monsen.)

A. You mean how were the shares divided? My sister and myself owned the Empire Printing Company.

Q. You owned the stock?

A. Yes; and I think you had one share.

Q. And you have yourself——

A. And Dorothy Lingo. I had 465 shares, and Dorothy had 200 shares.

Q. You had a little over two-thirds; is that right?      A. Yes, sir.

Q. You say frequently that the paper would come out and you wouldn't see the front page until after it was out. Now, in operating the paper when you were in Juneau, what did you do? You told in your deposition part of it. But what did you do in connection with the paper, your duties?

A. Frankly, I did most of the odd jobs. I think Mr. Daum said this morning that I was a reporter on the paper, and I was my own stenographer and would order——

Q. Did you have to supervise the management, the financial affairs, the income and outgo?

A. It was I who started worrying when one had to meet a payroll.

Q. You had quite a large payroll there and changing help from time to time?

A. Yes. [469]

(Testimony of Helen Monsen.)

Q. Quite frequently?

A. Except we have one man who has been there for over thirty-five years and is still there.

Q. Now, Mrs. Monsen, at the outset let's go to the deposition of Mr. McFarland, and Mr. McFarland's deposition was read here, and he stated that you had considerable animosity toward Governor Gruening but that you were a very nice lady after all, or something to that effect. Did you have any malice or animosity toward Governor Gruening at any time?

A. I think Governor Gruening knows that there is no personal animosity, no hatred, in my heart for him. Our differences have been matters of policy.

Q. And matters of informing the public?

A. Yes; and our policies about Alaska and so on and so forth. That doesn't mean I am right. I might have been wrong. But there were things I believed in that Governor Gruening did not believe in, and things he believed in that I did not believe in; and I think that is all right for a newspaper to express such opinions.

Q. Now, I might ask you, Mrs. Monsen, in writing up the news was it your custom there to gather the news, especially news of all public officials, and publish it as far as you could of public affairs?

A. Yes; that is true. [470]

Q. And to comment on it?

A. Yes.

(Testimony of Helen Monsen.)

Q. Sometimes it required comment?

A. Yes.

Q. Now, for instance, do you remember the steamship strike in 1952?

A. Yes.

Q. Did you always comment on the news, or sometimes not?

A. Well, apparently that is one time when we did not.

Q. You heard Mr. Daum tell about the officials of the Territory who were absent during that strike?

A. Yes.

Q. Do you have a list of them?

A. Yes.

Q. Will you give it to the jury?

A. I think that Mr. Gruening was lecturing then. He gave that, I believe, in his testimony, too. And Mr. Williams was out of town.

Q. The Attorney General?

A. Yes, the Attorney General. And his assistant; and Mr. Mullaney.

Q. Who was he?

A. The Tax Commissioner. And I don't know who else.

Q. Mr. Metcalf?

A. Mr. Metcalf, too. [471]

Q. What about the Commissioner of Labor?

A. And Henry Benson, the Commissioner of Labor.

Q. Now, did all those items appear in the paper?

A. Apparently they did, as news items.

(Testimony of Helen Monsen.)

Q. Did you ever make any comment on the whole situation?      A. No.

Q. Now, Mr. Kay asked Mr. Daum about printing editorials on the front page. Did you frequently have editorials, or not on the front page?

A. Not frequently, but whenever—it was not unusual.

Q. Now, Mr. Daum appeared here this morning and testified and he brought some notes that he had made at the time he interviewed the various officials concerned in this ferry fund. I think he said he got those notes from you. Why were those notes preserved?

A. Because of the threat of libel.

Q. Because of the libel suit?

A. We had been told just as soon as the paper was out by the people involved that we were going to be sued for libel, and I happened to run into the notes in Jack's desk and just by chance kept them, and the reason I happened to have them now is because on the first of June, when I sold the paper to Mr. Allen, we cleaned out files. Those files were still in my—I mean, the boxes in which everything had been put were still in my home, and in [472] order to lease my home on the first of November I had to go through them all, and I ran into quite a number of things.

Q. You mean, you had to take those all away from the Empire when you sold out?

(Testimony of Helen Mosen.)

A. I didn't have to but I did.

Q. I mean you did?

A. I wouldn't have found them if I hadn't.

Q. Now, I think you have testified about—well, you didn't testify. I might ask you about the testimony of Governor Gruening in which he identified an editorial that you wrote at the time he came to Alaska as Governor, and I might ask you if you welcomed him personally when he came there?

A. Yes.

Q. And did you set up any function for him and Mrs. Gruening when they arrived?

A. I think the night they arrived we got as many of the Democratic officials as we could, the committee members and so on, and that night, the night he arrived, he was sworn into office, as I recall. He can verify that. And then right after that Vida Bartlett and I had a tea for Mrs. Gruening.

Q. Now, when did you, do you remember when you began to differ with his policies, about [473] when?

A. Well, during the 1941 Legislature, as I recall.

Q. And what was the first, do you remember your first difference?

A. I recall that the Empire was not going along with the plan to build five armories in Alaska for \$750,000.00.

Mr. Nesbett: I can't hear the witness.

Q. (By Mr. Faulkner): Speak a little louder if you can.

A. I am awfully sorry.

(Testimony of Helen Monsen.)

Q. If you get tired, just let us know. If you can, speak a little louder.

A. The Empire did not go along with the policy of Mr. Gruening's program to build five armories in Alaska for a Territorial Guard, I believe. If the Territory had that much money to spend, schools would have been better to spend it on, I think. But then Mr. Connors, who was an old friend of the family, came down——

Q. Who?

A. Mr. Connors. He came down to the Empire office and asked me why the Empire wasn't supporting the Democratic——

Mr. Nesbett: Your Honor, I have tried to be extremely liberal and lenient in Mr. Faulkner's leading direct examination, but I think that also now I know she is going into a lot of hearsay, and I wish your Honor would caution her——

A. Oh, I beg your pardon.

Mr. Nesbett: ——as to hearsay. [474]

Mr. Faulkner: Well, it was——

A. So much——

Mr. Nesbett: It was——

A. ——has been said about me.

The Court: If you will permit me to consider the objection——

A. I am sorry.

The Court: The objection is to hearsay. I do not find that appears. The question was asked as to when she first began to disagree with Governor Gruening. Now, that may be answered, I think,



(Testimony of Helen Monsen.)

without reciting what was said to you. I think that is the real objection at this time.

A. Oh, I beg your pardon.

The Court: If you could, limit just your answer to that, not what was told you by others, but the reason for your disagreement, which I think you have already stated.

Q. (By Mr. Faulkner): And that will shorten it a great deal, Helen.

A. All right. I beg your pardon.

The Court: That is, we do not care to go into the details of your disagreement, but only the reason for it.

Mr. Faulkner: Yes; that is it.

The Court: That is the point.

Q. (By Mr. Faulkner): What is the reason, what the disagreements were about, if you can recall? [475]

The Court: I think she has already answered that.

A. I don't know how to go into this any further, but there were several things during that session of the Legislature that disturbed us. Oh, I don't know whether this is hearsay or not, but it disturbed us when this man came into my office and told me—can I tell you this?

Mr. Nesbett: Your Honor—

Q. (By Mr. Faulkner): No. Don't tell what somebody told you.

A. I beg your pardon.

Mr. Nesbett: I think the question has been answered, your Honor.

(Testimony of Helen Monsen.)

The Court: Well, again, if there were other things in which you disagreed, you may state generally what they were, but not what somebody told you. Do you get the difference?

A. Well, let's see——

Q. (By Mr. Faulkner): What the policies were and what things you disagreed about.

A. And I disagreed further—oh, let's see—I just can't think.

Q. Well, I think there is some testimony here that you disagreed over the Palmer Airport?

A. Oh, yes, definitely.

Q. And the Union Bank trouble?

A. Yes. [476]

Q. And did you——

A. And purges.

Q. Well, that has been gone into in the deposition, I think. Now, Mrs. Monsen, I have not asked you anything about the other two plaintiffs. Have you ever had any animosity or bitterness or malice toward Henry Roden?

A. I think Henry knows that I haven't.

Mr. Nesbett: I didn't hear the answer.

A. I think Henry—pardon me—Mr. Roden knows that I have not had any animosity or malice toward him.

Q. (By Mr. Faulkner): Have you been more than ordinarily friendly with him all these years?

A. Yes; I would think so.

Q. Have you written eulogistic editorials on him?

A. Yes, sir.

Q. And published other things that were all very good; is that right?

(Testimony of Helen Monsen.)

A. I believe so; yes, including stories or editorials that Henry has written, too.

Q. He has written editorials that you put in the paper, too? A. Yes.

Q. Now, Mrs. Monsen, have you any animosity or hard feelings or malice toward him today?

A. No.

Q. Or toward Governor Gruening? [477]

A. No.

Q. Or to Mr. Metcalf? A. No.

Q. Have you ever had any quarrel or any trouble with Mr. Metcalf? A. No.

Q. At any time? Or the paper; or has the paper had?

A. I don't think so, unless it is the subject of the suit.

Q. And do you have any malice or animosity or bitter feeling against him? A. No.

Q. Have you ever had? A. No.

Q. And, as he testified here yesterday, you have known him a long time?

A. A Number of years.

Mr. Faulkner: I think that is all. You may cross-examine.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Helen Monsen resumed the witness stand, and the Cross-Examination by Mr. Nesbett was adduced as follows:)

(Testimony of Helen Monsen.)

Q. Mrs. Monsen, I don't think that I will take long in cross-examining you. I will ask the questions as simply [478] as possible. Please take your time in thinking them over before you answer, and, if you do not understand the question, please ask me to repeat it or rephrase it, and I will be glad to do it.

A. Thank you.

Q. Now, Mrs. Monsen, referring to the deposition that we took when I came to Juneau on October 10th——

A. Yes.

Q. ——and the telephone conversation that you were discussing in that deposition in response to my question, that is, the telephone conversation that Mr. Small reported that you had had with Mr. Faulkner——

A. Yes.

Q. Now, is it possible that that telephone conversation that Mr. Small mentioned was between you and Mr. Banfield and not between you and Mr. Faulkner?

Mr. Faulkner: Pardon me. Now, just a minute. I object to that question. Mr. Small was asked that quite in detail in his deposition, and he was asked if he was certain of it, and he said yes.

Mr. Nesbett: Your Honor, that is no basis for an objection.

The Court: I feel that is proper cross-examination. Objection overruled.

Q. (By Mr. Nesbett): The question was—— would it be possible [479] that that conversation could have taken place, as you admitted in your

(Testimony of Helen Monsen.)

deposition it could have taken place, you didn't remember, between you and Mr. Banfield?

A. No; not the one to which Mr. Small referred; and I never talked over the telephone with Mr. Banfield.

Q. Mr. Banfield was Mr. Faulkner's partner?

A. Yes.

Q. And you have occasion to deal with him on legal matters quite often, do you not, instead of Mr. Faulkner?

A. Most of my dealings are with Mr. Faulkner.

Q. But on occasion you did consult Mr. Banfield, did you not?

Mr. Faulkner: Well, if the Court please, I have further objection to these question as the privilege in a communication between an attorney and client is not admissible in evidence.

Mr. Nesbett: Your Honor, I am not asking for any divulgence.

A. Can I say something?

The Court: Just a moment please.

A. I beg your pardon.

The Court: Just now I heard no such question. If the question is asked as to any further conversations between Mrs. Monsen and her attorney, and the question of privilege is here made, then of course we must invoke that rule. She cannot be asked such further questions without the consent of [480] her counsel.

Mr. Nesbett: Well, your Honor, it says right in the deposition that Mr. Banfield came to the

(Testimony of Helen Monsen.)

office. Do you mean that I cannot even touch on that subject?

The Court: I had not said that. I said cannot—

Mr. Nesbett: Not what was said.

The Court: Yes, that is what I said. The question did not relate to conversation.

Mr. Nesbett: Then the objection is overruled?

The Court: Then the objection is overruled as to that question.

Q. (By Mr. Nesbett): You may answer that, Mrs. Monsen, if you can.

Mr. Faulkner: What was the question, counsel?

The Court: The question was simply, as I understood it, whether Mr. Banfield came to her office. That is the question you objected to.

A. He came into the office the next morning. I think Henry was also—also came into the office the next morning.

Mr. Faulkner: Henry who?

A. Pardon me. Mr. Roden. And, I may be wrong, I believe that was at the time Jack Daum got the interview with Mr. Roden.

Q. (By Mr. Nesbett): Well, if you can, Mrs. Monsen, just please be responsive to the questions I ask you. Did [481] Mr. Banfield come to the office the day after the publication?

A. Yes; but not—nothing—it has nothing to do with Mr. Small's deposition. Mr. Small is completely incorrect in everything he says.

Q. Everything?

(Testimony of Helen Monsen.)

A. In everything he says about Mr. Faulkner calling and talking in a loud voice or in calling me at all.

Q. And after Mr. Banfield came to your office the day after this publication, I mean, the day after this publication you then went to see Mr. Faulkner as you testified, didn't you?

A. Then I did go up to see Mr. Faulkner.

Q. And Mr. Faulkner, you testified, told you that he did not consider this publication libelous, did he not?      A. Yes.

Q. And why did you have occasion to ask him if it was libelous?

A. Mr. Roden—I am not sure about this. I would like to ask Mr. Roden. Could I do that?

Q. Well, no. Just answer the question, if you can.

A. My memory is that Mr. Roden came into the office, that Mr. Daum interviewed him at that time, that Mr. Roden felt very badly, and I told him that I did, too, and we were trying to figure out something that could be done [482] to explain that, just what Mr. Daum meant in his stories in case the reading public didn't understand. Is that—

Q. Well, no. The question, Mrs. Monsen, was why did you go to see Mr. Faulkner?

A. Because Mr. Daum had written this "Attention" paragraph that is in the paper, and I wanted to ask Mr. Faulkner if that was correct, if that was all right to do.

(Testimony of Helen Monsen.)

Q. Now, you say you felt very badly over Mr. Roden being handled in the publication of the 25th, the way he was?

A. Well, yes. You want yes and no answers? I felt badly about—I don't like to hurt anyone; I am sorry.

Q. You didn't know that that was going to happen to Henry Roden the day that it was published, did you?      A. No.

Q. If you had known that that publication was going to be made, you probably wouldn't have done it?

Mr. Faulkner: Just a minute. I object——

The Court: That may be argumentative.

Mr. Faulkner: Yes; I think so.

Mr. Nesbett: I will rephrase it.

Q. (By Mr. Nesbett): If you had known the publication was going to be made in that way, would you have permitted it?

Mr. Faulkner: Now, again, that is argumentative.

The Court: Well, I doubt if that is argumentative. [483] It is not an argument. It is a question. You may answer it.

A. I have told—I think, when I saw you that day, Mr. Faulkner, I told you that one of my difficulties was separating myself from being a newspaper publisher and a——

Q. Mrs. Monsen, to get back to the question——

Mr. Faulkner: Let her answer the question please.



(Testimony of Helen Monsen.)

Mr. Nesbett: She isn't answering. I have a right to ask her to be responsive, Mr. Faulkner.

The Court: That is true.

Q. (By Mr. Nesbett): Do you recall the question, Mrs. Monsen? A. No.

Mr. Nesbett: I wonder if I could have the reporter repeat it?

The Court: Yes. Would you repeat it please, Miss Maynard?

The Reporter: "Q. If you had known the publication was going to be made in that way, would you have permitted it?"

A. That was a long time ago. I don't know what I would have done at the time. There would probably have been an argument, and it is very possible that Jack would have won because he wasn't doing anything—he believed in what he was doing.

Q. (By Mr. Nesbett): Then, your answer is yes, you would have permitted it? [484]

A. I think so; I mean, it would have been over, no doubt over, an argument.

Q. As of that time, Mrs. Monsen, you had been managing the Empire for about ten years, hadn't you, as President of the Corporation?

A. Yes.

Q. And do you mean that you would have permitted a man who had only been with you for thirteen days to dictate to you the——

A. I had known Jack before——

Q. Pardon me. A. Pardon me.

Q. ——the type of publication that was going to be made?

(Testimony of Helen Monsen.)

A. I would have deferred to his judgment. My judgment was frequently that of a woman rather than a publisher, and there is a difference there, as far as I am concerned.

Q. You were entirely familiar with Alaskan politics, particularly around the capital, then, weren't you?      A. I presume so.

Q. And Mr. Daum had spent the year preceding that in Washington, D. C., hadn't he?      A. Yes.

Q. And would your answer still be the same, that you would have permitted him, after being with you only thirteen days, to make such a publication, if you had known about [485] it?

A. Aren't you repeating your question there? I don't know. I told you the——

The Court: I rather think, counsel, although there is some leniency on cross-examination, that the subject is sufficiently exhausted. She has answered the question.

Mr. Nesbett: There is no objection, your Honor, except from the witness.

The Court: Well, the witness herself; the Court may consider that; that is, if you had not received a responsive answer, then you should be permitted to continue the cross-examination, but, if you have, then the subject should be dropped.

Q. (By Mr. Nesbett): Mrs. Monsen, in your deposition on Page 20 I asked you this question: "Didn't you dictate any policy in general to your——" Then the answer commenced: "In most cases it was not necessary, because most of the people who

(Testimony of Helen Monsen.)

worked on the Empire knew about how I felt about various and sundry things, and I tried to be fair and I tried to publish nothing except what I believed the people had a right to know. That is part of the duty of a newspaper, you know.”

Now, it is a fact, isn't it, that all of your employees knew your policy and your attitude toward what, as you termed, Governor Gruening was attempting to do in [486] Alaska?

A. Golly, I would think so.

Q. Well, you say in most cases it was not necessary to dictate policy. Then, I will ask you why was it not necessary to inform your executives and reporters of your attitude as publisher of the paper?

A. Through most of the forties, up until 1948, Bill Carter was running the paper, and much of that time I was in the hospital in Seattle or ill in Seattle and under doctor's orders. I would be in Juneau, oh, for six weeks or so at a time, three or four times a year. I left things to Bill at that time. Bill was aware of what was—can I say—what was going on, more aware than I. Bill Carter, I am referring to. And the policy was as much Bill Carter's policy as it was mine up until that time; that was up until the spring of 1948.

Q. And then after 1948 Mr. Carter left your employ, did he?           A. Yes.

Q. And did you inform the—did you hire a new managing editor, or whatever you call it?

A. No. We were limping along. I have forgotten who we had there then. We were—usually I did not

(Testimony of Helen Monsen.)

have to inform the people about what to do.

Mr. Faulkner: What was that last?

The Reporter: "Usually I did not have to inform [487] the people about what to do.

Q. (By Mr. Nesbett): But after 1948, Mrs. Monsen, is it a fact that you informed your new managing editors, as they came, of your general policy of the newspaper with respect to the political atmosphere?

A. I take it you are referring to Mr. McFarland?

Q. No. In general after 1948?

A. Well, who did we have? I have forgotten who was on the Empire in 1949. I think we were operating with the desk man and the business manager and reporters who had all been with us, and they knew what to do.

Q. You read most, if not all, of the editions of your paper that were printed, did you not?

A. Yes.

Q. You knew in general the policy or attitude reflected in the editorials and news reporting published in those editions, didn't you? A. Yes.

Q. And you approved in general those publications and that attitude, didn't you?

A. Not always.

Q. And did you then, when you disapproved, so inform your editors?

A. Sometimes one just lets matters ride, Mr. Nesbett.

(Testimony of Helen Mousen.)

Q. Well, can you answer my question? Did you inform your [488] editors on those occasions when you disapproved?

A. Not always; no. I don't think a woman has any business being a newspaper publisher, and I think anybody who has worked for me will say the same thing. When you have employees, you want to let them run the paper.

Q. Well, I understand your position, but you, as a matter of fact, got the paper from your father and you were sort of saddled with it and then tried to run it and——

A. I felt it was a responsibility, too.

Q. Well, did you ever on any occasion call your managing editor in and inform him of your disapproval of attitudes or policies reflected in editorials or news reports?

A. I suppose I did.

Q. And did you on occasions call them in and compliment them on reflecting the proper attitudes of the Juneau Empire when they had done in your opinion a good job of reporting?

A. I hope I did.

Q. Mrs. Mousen, do you recall this—I am showing you Plaintiffs' Exhibit 6; do you recall this editorial, dated Friday, May 25, 1951, entitled "The Governors' Trip," printed in the Empire?

A. Yes; I guess I do. I don't remember the editorial. I remember the occasion of Governor Warren being in Alaska. You might notice, too, that—that is

(Testimony of Helen Monsen.)

not the Empire. I am not [489] the only one. That is something I object to, as being—just making it personal.

Q. I beg your pardon?

A. This is just being made—you know what I mean.

Q. No, I am not, Mrs. Monsen. I am trying to be as careful as I can. I don't want you to get excited. After all there is a case to be decided, and the jury has a right to—

A. Yes, sir; that is true; and I beg your pardon.

Q. Do you recall the editorial entitled "R. E. (Anything For A Laugh) Sheldon," dated April 15, 1952, also a part of Plaintiff's Exhibit 6?

A. Golly, yes. I read it either—I don't know whether I was in town or not when I read it afterwards.

Q. Did you write it?                      A. No.

Q. What is the next editorial? I will read it so we can identify it for the record.

A. Oh, I beg your pardon.

Q. An Empire editorial, dated Monday, April 14, 1952, a part of Exhibit 6, entitled "The J-J Clambake." Did you write that editorial?

A. I didn't.

Q. Do you recall reading it in your newspaper?

A. I presume I did. I don't recall. I would be dishonest [490] if I said I did, but I don't. I presume I did.

Q. And then, Mrs. Monsen, the last, the next to the last portion of Exhibit 6, Plaintiffs' Exhibit 6,

(Testimony of Helen Monsen.)

an editorial published Thursday, September 13, 1951, entitled "Another Stab in the Back," do you recall that editorial and did you write it?

A. I didn't write it. I recall it.

Q. And then the last editorial in Exhibit 6, Mrs. Monsen, an Empire editorial, dated September 7, 1951, entitled "Trouble in Paradise," do you recall that editorial and did you write it?

A. I don't recall that I was in town at the time, but I don't know.

Q. Do you recall the editorial itself?

A. No.

Q. You do not?                   A. No.

Q. Mrs. Monsen, with respect to the editorial entitled "The Governors' Trip" and discussing the visit of Governor Warren of California, did you approve the editorial policy reflected, the publisher's policy reflected, in that editorial with respect to the statements that in effect Governor Warren had been duped by the Gruening machine into making a statement, a speech, in favor of statehood? [491]

A. Does it say he had been duped by the Gruening machine?

Q. In words to that effect, offering "humble apology" that Governor Warren was subjected to that sort of thing.

A. Yes; we had a letter from Fairbanks about the situation. It was very distressing.

Q. Mrs. Monsen, with respect to this particular paragraph of the editorial:

"The Governor of California then unknowingly

(Testimony of Helen Monsen.)

stepped into the trap and in an anti-statehood Fairbanks where he was guest of its University he delivered a speech on statehood that was plainly from the notebook of the statehood committee.

“What was to have been a delightful social affair turned out an embarrassing political rally for statehood and the Governor’s fair-haired favorites.

“It was an imposition on the good nature of a greater leader when he was used for such a lowly and purely selfish purpose.

“The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its Governor.”

Did you approve that type editorial policy as reflecting the policy of the publisher of the Daily Alaska Empire?

A. It is so difficult to say things without explanations. [492] Yes; I will say that, and try to avoid explanations.

Q. Then the editorial “R. E. (Anything For A Laugh) Sheldon,” written on April 15, 1952. Mr. Sheldon was a candidate for the office of Auditor of Alaska at that time, was he not? A. Yes.

Q. And the editorials of the Daily News, that is, the Alaska Daily News, the Times, reflected the policy of the newspaper. Did you approve an editorial being entitled with respect to a candidate and describing that candidate in the words placed in parentheses “(Anything For A Laugh) Sheldon”?

A. Isn’t that what Mr. Sheldon was doing at that time?



(Testimony of Helen Monsen.)

Q. Don't ask me, Mrs. Monsen. Answer the question, if you can.

A. Under the circumstances I think that was all right.

Q. Mrs. Monsen, the editorial, a part of Exhibit 6, dated April 14, 1952, entitled "The J-J Clambake," this portion of the editorial I am going to read:

"After the candidates had been heard, the assemblage was treated to a ten-minute talk by Governor Gruening. His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman administration and his own and went on to take a few pot shots at a group of Juneau citizens whose views are [493] apparently at variance with his own."

You didn't write that editorial, did you?

A. No.

Q. Do you approve that sort of attitude?

A. What is the next?

Q. Do you approve that sort of attitude?

A. What is beyond that?

Q. The editorial goes on before and after that. I am only asking you about this particular portion. "His Excellency" and the Governor "brayed happily" and so forth—do you approve that sort of language in description in your editorials?

A. If that is what occurred.

Q. Did you say anything to your editorial staff about having described the Governor of Alaska in that fashion in your columns?

(Testimony of Helen Monsen.)

A. Hadn't he been denouncing other people, other Juneauites in the——

Q. It said, "a few pot shots." Now, can you answer the question? Did you approve that method of describing the acts of the Governor of Alaska?

A. If that was the situation at the time, I presume it was all right. I don't know.

Q. You mean, if His Excellency actually brayed, why, it was all right to say so? [494]

A. I think that that is literary license, if that is literature.

Q. Do you think that is fair comment on a matter concerning the acts of a public official?

A. I think that Governor Gruening probably said things about people in Juneau that——

Q. But try to answer the question, Mrs. Monsen, if you can. Do you think that is fair comment, to describe or reflect your policy in connection with acts of public officials?

A. Well, you can't always be—I told you my difficulty is separating myself from the newspaper, and under that circumstance I think that was all right.

Q. There was another editorial, dated September 13, 1951, entitled "Another Stab in the Back," and that concerns the removal of the Secretary of Alaska, Lew Williams, and in the first paragraph is the expression—the sentence is used: "Ananias was a piker." And it describes the act of the removal as "the latest in the long series of Gruening

(Testimony of Helen Monsen.)

purges," and it goes on to say, "the Governor insists, with wide-eyed innocence, that he 'had nothing to do' with Williams' dismissal. Ananias was a piker." I will ask you whether or not you approved that attitude and—approved that attitude?

A. Yes.

Q. And do you think it is fair comment to compare a high [495] public official with one Ananias?

A. Can I add, by the way, that Ananias is not a character in Greek mythology. I think you will find Ananias in the Bible.

Q. Do you still say you didn't write this editorial?

A. As far as I know, I did not; I don't know.

Q. You might have and then forgotten it?

A. No; I don't think I wrote it.

Q. Did you tell the person who wrote it about Ananias and suggest to him what he should write in the way of an editorial?

A. No. We felt quite strongly about Lew's removal at the time.

Q. Felt quite strongly about what?

A. About the removal of Lew Williams at the time. That is also a privilege of a newspaper, I believe.

Q. Yes. You considered it the privilege of a newspaper to in effect call the Governor a liar in print and as comment simply because he denies having anything to do with a removal which came from Washington, D. C.?

A. He was within his right to say he knew noth-

(Testimony of Helen Monsen.)

ing about it, but we had been told on very good authority that he knew all about it. Now, I may be wrong about that, Governor Gruening, but I believed at the time that it was all part of a plot that had gone on for sometime. [496]

Q. Don't you think it would have been more in line with newspaper ethics and fair play and fair comment to, if you felt that way, in your editorial to say that, although the Governor has denied having anything to do with it, we hold a different opinion for reasons thus and so?

A. It probably would, but on a small town newspaper, sir, one doesn't have time to weigh one's writing. Mr. Daum can verify that.

Q. You have time to weigh the effect and the importance of the words you are using with respect to one of the highest officials of the Territory, even though it might be a small paper, but it is still the capital paper?

A. One should have. We had a very small staff.

Q. Now, after having your attention drawn to those editorials which are part of Exhibit 6, Mrs. Monsen, all of which editorials you say you approved, and the editorials ran from 1951 and into 1952, can you actually state that you did not tell your editors and reporters what your attitude was with respect to a given incident or situation and expect them to reflect your attitude in your publication?

(Testimony of Helen Monsen.)

A. No. They felt the same way I did, I believe, and, in spite, I think these all have to do with officials and acts and policies and so on. They had nothing to do with Governor Gruening personally. [497]

Q. Well, wouldn't it have been just slightly more dignified, if not much more dignified, to, in describing the acts of the Governor of Alaska in the publication, issuing out of the capital of Alaska and circulated all over this Territory and to, as you admit, places all over the United States, including the capital, to describe his talk as a speech and criticize its contents, if you wanted to, rather than say the Governor "brayed"? Now, that is not necessary, insofar as differing with him on his policies, to say he "brayed" rather than he talked?

A. It probably would have been just as effective to say that he talked.

Q. It wouldn't have been as effective to convey the attitude of complete disharmony or dislike on the part of the attitude of the publisher, would it; that is, to say "brayed" instead of talked?

Mr. Faulkner: If the Court please, I think this examination is getting drawn out unduly, and these questions are argumentative.

The Court: I find the last three questions to be unduly argumentative, counsel. They have been answered, but it is suggested that such be avoided.

Mr. Kay: May we confer, Your Honor, for just a moment?

(Testimony of Helen Monsen.)

Mr. Nesbett: In view of Mrs. Monsen's feelings, [498] Your Honor, and the long day we have had in Court, Mr. Faulkner and I agree that, if it is acceptable to Your Honor, we could recess now——

The Court: Very well.

Mr. Nesbett: ——and reconvene in the morning at any time your Honor suggests.

The Court: Very well. You do not wish to conclude your cross-examination now, at this time?

Mr. Nesbett: No.

The Court: Very well.

(Whereupon, the jury was duly admonished, and the trial was adjourned until 10:00 o'clock a.m., November 18, 1955, and resumed as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

The Court: At the recess last evening you were not finished with your cross-examination, Mr. Nesbett?

Mr. Nesbett: No, sir.

The Court: Mrs. Monsen, then, may resume the stand for further cross-examination.

(Whereupon, the witness Helen Monsen, resumed the witness stand, and the cross-examination by Mr. Nesbett was continued as follows:)

(Testimony of Helen Monsen.)

Q. Mrs. Monsen, I will show you a photostat of an editorial appearing in the Juneau Empire, Saturday, March 15, 1952, [499] entitled "The Return of 'Alibi Ernie'", and ask you if you wrote that, or if you recall it.

A. I didn't write it. I think you will find that I was out of town at that time, if you want to look it up.

Q. You were out of town at that time?

A. Yes.

Q. You recall the editorial, do you not?

A. No, I don't.

Q. You mean, you have never read it?

A. Not that I know of.

Q. Would it refresh your memory if I read the first paragraph: "On his return from Washington, Alaska's parttime Governor was ready with the usual alibis for the latest failure of the statehood bill." Do you recall that?      A. No.

Q. I will show you a photostat, Mrs. Monsen, of an editorial appearing in the Daily Alaska Empire on July 9, 1952, entitled "The Artful Dodger," carrying on: "Agile Ernie, the artful dodger, again managed to sidestep comment on the notorious Palmer Airport deal" and so forth. Did you write that editorial, or do you recall it?

A. I did not write the editorial.

Q. Do you recall, or did you write, an editorial appearing in the Daily Alaska Empire on September 11, 1952, entitled [500] "And Pays, and Pays, and Pays." "Alaska's footloose Governor, probably

(Testimony of Helen Monsen.)

the most traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory." Do you recall that editorial, or did you write it?      A. I didn't write it.

Q. Do you recall that editorial appearing—that would be a matter of two weeks prior to your publication of the issue of September 25th?

A. I may not even have read it. I was in Juneau at the time. That was the week of the "Kathleen" wreck, and we were doing a lot of very hard, earnest reporting on the "Kathleen" at that time.

Q. Somebody spent some hard, earnest time on that editorial, and I was wondering—

A. No; they probably didn't. They probably dashed that off in a very short time, and it was not I that did it.

Q. A matter of a few minutes?

A. I would think so.

Mr. Nesbett: Your Honor, I would like to introduce this in evidence (handing proposed exhibit to defendant's attorney.)

The Court: Is there any objection?

Mr. Nesbett: No objection, Your Honor.

The Court: The editorial offered may be admitted [501] in evidence, that is, the photostatic copy.

The Clerk: Plaintiff's Exhibit No. 12.

Mr. Nesbett: The editorial is rather short, Your Honor, and I will read it. Thursday, September 11, 1952, of an editorial in the Daily Alaska Empire, entitled in large print "And Pays, and Pays, and Pays."



(Testimony of Helen Monsen.)

“Alaska’s footloose Governor, probably the most traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory.

“Depending on flying weather, the Gubernatorial tourist will fly to Haines, then proceed by auto over the highways. He said yesterday he hankers to test some of the road improvements made during the past few years.

“Sometime during his tax-supported tour, he is scheduled to speak before a science conference at Mt. McKinley.

“As subject for his talk, we suggest he use the title of his own book: ‘The Public Pays.’”

Beneath the editorial, slightly separated from it, but directly underneath, is the one sentence: “If you are ever in doubt, about saying something, don’t say it.”

Directly below that squib or remark is another one which reads as follows: “No one can be as sure of his opinions as the thoroughly ignorant.”

Now, would that editorial and the comments appearing directly beneath it, in your opinion, be fair comment upon the [502] official acts of the Governor of the Territory?

A. I think the lines beneath it had nothing to do with the editorial.

Q. (By Mr. Nesbett): The editorial itself, Mrs. Monsen, would you answer the question in that respect? Do you consider that to be fair comment by

(Testimony of Helen Monsen.)

the newspaper on the official acts of the Governor?

Mr. Faulkner: If the Court please, I don't think the question of fair comment would apply on an editorial. An editorial is either privileged or not. But fair comment, I think, is comment on the facts published.

The Court: Fair comment certainly applies to editorial matter as well as news. As a matter of fact, the Court would hold it would be more so. The objection is overruled.

Q. (By Mr. Nesbett): Will you answer that question?

A. I think under the circumstances that it probably does.

Q. That it probably is fair comment?

A. Yes.

Q. And represents the attitude of the Daily Alaska Empire toward the Governor and his administration?

A. Towards his administration.

Q. Mrs. Monsen, considering that editorial and the other two that I mentioned to you this morning, in connection with the other editorials that I presented to you [503] yesterday afternoon, can you state that those editorials represent, generally, the attitude of the Daily Alaska Empire toward the Governor and his administration?

A. Generally, I presume, as far as I can see, it is the duty of a newspaper to call attention to circumstances to which it objects.

Q. Do you—rather, I will ask you this question,

(Testimony of Helen Mosen.)

Mrs. Mosen. On direct examination by Mr. Faulkner I believe you testified, did you not, that you had sold the Daily Alaska Empire?      A. Yes.

Q. And what price did you sell the Empire for?

Mr. Faulkner: Well, if the Court please, I think that that is immaterial and objectionable. I object to it. It has no bearing on this case. What she sold it for has nothing to do with the case. We would have to go into the matter of debts and mortgages and all that sort of thing, and it is collateral to all the evidence.

The Court: I can't see any relevancy, counsel, to any such inquiry.

Mr. Nesbett: Well, Your Honor, then may I ask that the jury be excused and present my authorities? I am convinced, and have done it many, many times, that we have every right in the world to present evidence of the financial status of the defendant, in this case a corporation. With respect to [504] Mrs. Mosen, I have no desire whatsoever to pry into her private, personal affairs. She is not a defendant. I have every right under the law to present evidence of the financial status of the defendant corporation, the Empire Printing Company.

The Court: The Court had intended to instruct the jury that they must completely disregard any matters concerning the financial status of either party in determining the issues of this case. If we are in error in that, I should like to hear from you, sir.

(Testimony of Helen Monsen.)

Mr. Nesbett: Very well, Your Honor. I would certainly like to be heard.

The Court: The jury may be excused while we discuss this matter.

(Whereupon, the jury retired from the courtroom.)

The Court: You may step down then, Mrs. Monsen, unless you are just as comfortable there. Are you?

Mrs. Monsen: It is just as comfortable.

Mr. Nesbett: May I have a moment, Your Honor. My files have grown so large it will take a moment to find it. Your Honor, in my research and in trying cases of a similar type, slander and libel, the evidence has always been admitted in the Alaska courts.

However, I have in my notes here certain cases, that I found in research, holding to this effect—the majority of [505] the courts hold that such evidence, referring to evidence of the financial status of the defendant, is admissible to show the weight and credence to be given to the defendant's utterances, and, most important, is relevant in assessing damages, especially if punitive damages are asked for. In that case the United States Supreme Court passed upon the exact situation, in the case of *Washington Gas Light Co. v. Lansden*, 172 U. S. 534.

And in a case quite similar to this one, decided by the Supreme Court of California, and, incidentally, a libel case which is cited throughout the authorities because it covers so many various points,

(Testimony of Helen Monsen.)

entitled *Scott v. Times Mirror Publishing Co.*, Supreme Court of California, reported in 184 Pacific 672; there is an annotation covering this point in 34 A.L.R., commencing at Page 8; briefed, that annotation is to this effect—the majority of cases seem to hold that the financial condition of the defendant is material “upon the theory that in all malicious torts where, in addition to the compensatory damages given to make whole the plaintiff’s injury, ‘added damages’ are allowed by way of punishment to the defendant for his wilful conduct, and as an example to others to refrain from such acts, the amount of added damages must bear a ratio to the resources of the person punished in order to effect the purpose of such damages.” And citing the *Scott v. Times Mirror* case, a United States Supreme Court [506] case and—I have counted them, Your Honor—twenty-one other state courts, all holding to that effect, citing the only contrary state court as being the Supreme Court of Michigan.

Now, Your Honor, Mr. Faulkner in his direct examination touched on the point of the sale of the Empire Corporation, the number of shares of stock held by Mrs. Monsen with respect to the number held by her sister, Mrs. Lingo, and mentioned the one share held by Mr. Faulkner or which was held.

I have every confidence that we have every right under the authorities, Your Honor, to present this evidence and, as I say, I have done it many times myself, and it has always been accepted by the courts.

(Testimony of Helen Monsen.)

Mr. Faulkner: If the Court please——

The Court: Well, in any event, counsel, would it be proper cross-examination? Would it not be a part of your case in chief, or at least in rebuttal, to call this witness on your own behalf?

Mr. Nesbett: I discussed that with Mr. Kay last night, and it seems hardly important. If Your Honor will permit—I don't know what you would do in a case like this—I could call the witness as my own for that purpose only or—it is properly, however, part of the cross-examination. Mr. Faulkner brought in the fact that the corporation had been sold and the number of shares. Am I not permitted to inquire [507] on that point?

The Court: That is true.

Mr. Kay: Your Honor, I had something to add. We discussed calling Mrs. Monsen or Mr. Allen as to the purchase price and the value of the property, but it seemed that rather than expose yourself to the risks which may occur in the trial of a lawsuit by calling an adverse witness that it would be proper, because we had anticipated that at least some opportunity would be offered by the direct examination, to present this evidence as proper cross-examination. However, if there is a feeling that it is not proper cross-examination, then in that event we would ask leave of the Court to reopen our case in chief for the very limited purpose of making Mrs. Monsen our witness for a few minutes to bring out the details of the financial transaction. I think we are entitled to the evidence.

(Testimony of Helen Monsen.)

Mr. Faulkner: Now, if the Court please, I don't think that that is so, because I have heard the authorities read by counsel here, but I don't think the Court can be very well informed on what the law is by somebody reading the syllabus of a case. I think you should examine the case and the nature and the circumstances under which that might be permitted. I know that in general it is not permitted. I know that one of these cases is *Scott v. Times Mirror Publishing Company*, 184 Pacific. Now, that is a California case [508] that I have seen. I don't recall just what is in it. But the Court will notice it is quite an old case, and the Supreme Court of California has flatly reversed itself—now, I don't know whether in this particular—but generally on the question of libel, and gone back to the case of *Coleman v. MacLennan*, as the Court of Appeals for the Ninth Circuit said last December. And the case of *Schy v. Hearst Publishing Company* is a recent case. The one they cited here is an old one, and, as I say, I don't know—I was wholly unprepared for this. But I think the Court can see where a thing like that could lead.

Now, I don't know what counsel's purpose could be, whether it is to show the jury that the defendant could pay a judgment over \$400,000.00 or not; I don't know. That would be quite simple to show that it couldn't pay it, but to go into a thing like that—Mrs. Monsen has said that she sold the Empire, selling it on contract. We haven't the contract here.

(Testimony of Helen Monsen.)

Mr. Nesbett: Yes, we have a certified copy right here.

Mr. Faulkner: Well, all right. Now——

The Court: I do not think that she testified that she sold it on contract, but, if that is admitted—I think she just said that she had sold it to Mr. Allen.

Mr. Faulkner: That is right. Counsel knows how she sold it. And to attempt to go into the question of the purchase price wouldn't have anything to do with this, as to [509] what assets the defendant might have, because that would depend upon liabilities and mortgages and notes and indebtedness and various things that would take us a long time to go into, and, certainly, I would not want Mrs. Monsen asked those questions suddenly from the witness stand without an opportunity to reflect on it and to refresh her memory. She hasn't got the material. She doesn't even have a copy of the contract here. Counsel for plaintiffs have.

I think it is a thing that is highly immaterial in a case of this nature, and, as I say. I never examined any of those authorities, but I think that you will find that there are some circumstances in those cases which are not present in this case, and I would like to see some more up-to-date authorities from the Supreme Court of California, which decisions we must follow according to our Court of Appeals.



(Testimony of Helen Monsen.)

The Court: Well, counsel, we would not undertake to determine this point without a review of the authorities cited on the question. It is new to me. If this be the rule, it is certainly an exception to the ordinary rule in Court cases in which the question of the financial responsibility of the parties against whom damages are sought might be not only irrelevant but might be prejudicial. I would not care to pass upon it without careful review of these authorities.

Mr. Faulkner: Well, I think, Your Honor—

Mr. Nesbett: I think it is my turn to be heard, Your Honor.

The Court: Very well.

Mr. Nesbett: I will stand on the authorities and follow any method Your Honor suggests so that we can present to Your Honor a clear picture of the argument in favor of one side or the other and let Your Honor pass on it.

Mr. Faulkner: Well, what I was going to say, Your Honor, is that I think the reason courts don't admit that kind of evidence is it might—it would more likely be highly prejudicial to a plaintiff because, if that has a bearing on the case, most any defendant could come in court and minimize what they have.

The Court: Well, of course, the plaintiff waives that if they offer it in evidence.

Mr. Faulkner: Well, I think they do.

Mr. Nesbett: It is immaterial.

(Testimony of Helen Monsen.)

Mr. Faulkner: I think that is the rule on it and I don't think that that is admissible at all.

Mr. Kay: May I cite just 33 American Jurisprudence, Section 284, Your Honor. That contains——

The Court: 284?

Mr. Kay: Section 284 of Libel and Slander—contains apparently all of the authorities or at least those available, and I know that there has been no change apparently in the [511] Pocket Part, '55 Cumulative Supplement, in the language of the text. I haven't examined it in these cases, as Mr. Nesbett has, but the language of the text would certainly support the position taken by the plaintiffs.

The Court: Well, frankly, I am not prepared to rule upon this matter at this time. It is new to me. Therefore, what we shall do is this—for the time being—well, we will not even decide it. We will reserve decision upon the question, but for the present, at least, until decision is made, the objection of the defendant will be sustained with the right of the plaintiffs to renew the question at a later time either by calling Mrs. Monsen as their own witness in rebuttal, which I think may be done, or by further cross-examination if desired. We will try and determine that, if possible, during the noon recess.

Mr. Nesbett: Your Honor, I have no other questions to ask, so, if you sustain the objection subject to my right to renew—what does Your Honor

(Testimony of Helen Monsen.)

want me to do—present the cases with markers in them to you?

The Court: Well, if you have any further authorities. I have noted those cited.

Mr. Nesbett: I have none now, but the annotation in A.L.R. would give you every state.

The Court: Yes. Well, I will examine that carefully. [512]

Mr. Nesbett: Well, you say with the right to renew the question on cross-examination?

The Court: I said either on cross-examination or further cross-examination or in rebuttal, if you so desire. That is, I do think, by reason of the fact that Mrs. Monsen did testify having sold the paper, that it may be proper cross-examination; that is, it may have sufficient relation to her testimony in chief; but, certainly, she can be later recalled for further cross-examination if we determine you have a right to go into that.

Mr. Nesbett: Very well.

The Court: Call in the jury then.

(Whereupon, the jury returned and all took their places in the jury box.)

The Court: For the benefit of the jury, the Court is obliged to reserve decision upon the question of the relevancy of the question last asked of the witness Mrs. Monsen, and for the present at least the objection is sustained with the right reserved to plaintiffs to renew the question when we are able to do a little research on the matter and finally determine the question.

(Testimony of Helen Monsen.)

Do you have any further questions?

Mr. Nesbett: No, Your Honor.

The Court: Do you have any redirect?

Mr. Faulkner: Yes, Your Honor. [513]

Redirect Examination

By Mr. Faulkner:

Q. Mrs. Monsen, Mr. Nesbett introduced an editorial here, and read it to the jury here this morning, which was dated November 11, 1952, and I think you said in answer to his question that that was during the week of the "Princess Kathleen" wreck? A. I thought it was September.

Q. What was that date?

A. I thought it was September.

Q. September 11, 1952. Now, do you recall when the "Princess Kathleen" was wrecked?

A. The Sunday before that, I believe.

Q. The Sunday before September 11th?

A. I think so.

Q. This editorial was dated September 11, 1952, and the article complained of in the paper was dated September 25, 1952? A. Yes.

Q. Do you think the "Princess Kathleen" wreck was during that week?

A. I think it was the Sunday before September 11th.

Q. Are you sure of that?

A. I am pretty sure; yes. It is by special incidents that one usually remembers occasions. [514]

Q. Now, Mrs. Monsen, you were asked some questions about the editorials which are somewhat

(Testimony of Helen Monsen.)

critical of Governor Gruening, and I think you gave some statements yesterday regarding things that you disagreed about and when it was. Do you recall any other matter along in the forties where you had to take issue with the Governor, where the paper did?

A. Oh, golly, there were many times. One was, I think it was, in 1947, that a bill had passed both houses of the Legislature asking that board meetings be open meetings, that any meetings that had to do with the public, feeling of the public, be open meetings, and that the press be allowed to be present, and I believe that passed both houses; it was introduced, I think, by Mr. Johnson of Fairbanks; and it was vetoed by Governor Gruening.

Q. Now, in connection with that, was that bill sponsored by most of the newspapers?

A. By most of the newspapers and by the Associated Press.

Q. And you took issue on that? A. Yes.

Q. The veto of that bill? A. Yes.

Mr. Faulkner: I think that is all.

The Court: Any recross-examination?

Mr. Nesbett: No recross, Your Honor. We only [515] reserve our right on that particular matter.

The Court: Yes. That will be all then, Mrs. Monsen.

(Witness excused.)

## JACK D. DAUM

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

## Direct Examination

By Mr. Faulkner:

Q. Mr. Daum, I will hand you Plaintiffs' Exhibit 1, and I want to ask you another question about that. You said yesterday that the articles on the front page had been set up or—I don't know just how you put it—the night before. What did you say about that?

A. Yes; I said the front page had been dummied the night before.

Q. Dummied. Now, does that mean the entire front page?

A. When you dummy a front page, you dummy your main stories in, and, ordinarily, you don't dummy beneath the fold, and your top stories go in, and then you fill in with these small fillers. The shop man, the floor man, the printer, if the stories that you dummy in don't fit exactly the columns, they will fill in with the little fillers themselves, so you don't dummy those things in. I did dummy in a space for the weather report. You just dummy that in, and they leave a hole for it. Then you [516] pick the weather report up the following day and have it set in type, and they put it in where you have left the hole.

But there is one story here that occurred the following day. It is a fire that occurred in Juneau

(Testimony of Jack D. Daum.)

around noon of the day of publication, and Mrs. Pegues brought that story in around noon, so I pulled out the story that I had dummied in there, because it is a good, you might call it, literally, a hot story.

Q. You mean, the fire was?

A. Yes, sir. And I pulled the story out that I had in there and stuck this local story in to get it on Page 1. But I wanted to explain that that is how the story that occurred that same day of publication got on this front page even though the page itself was dummied the night before.

Q. All the remainder was dummied the night before?

A. Yes, sir.

Mr. Faulkner: I think that is all.

Mr. Kay: No questions.

(Witness excused.)

Mr. Faulkner: I want to introduce—this is very brief—the deposition of Minnie Coughlin, which is on file here and was taken pursuant to notice. You have no objection to that? [517]

Mr. Nesbett: No objection.

The Court: If it was taken pursuant to notice, why, it may be admitted.

Mr. Faulkner: To twice as much notice as the law requires, I think. I will read the deposition. It is very brief.

“Pursuant to a notice dated October 27, 1955, and signed by H. L. Faulkner, of attorneys for defendant, and served on the plaintiffs and on plaintiffs’

attorneys, the deposition of Mrs. Minnie Coughlin was taken before Patricia L. Wood, Notary Public in and for the Territory of Alaska, at the offices of Faulkner, Banfield & Boochever, 110 Seward Street, Juneau, Alaska, November 3, 1955, at the hour of 5:00 o'clock p.m."

(Whereupon, the deposition of Mrs. Minnie Coughlin was read as follows—by Mr. Faulkner:)

### MRS. MINNIE COUGHLIN

called as a witness on behalf of defendant in the above-entitled action, being first duly sworn upon oath, deposes as follows:

By Mr. Faulkner:

Q. Will you please state your name?

A. The way it is spelled legally is Minnie Coughlin.

Q. That is M-i-n-n-i-e? A. Yes. [518]

Q. And you are the widow of Robert E. Coughlin? A. Yes.

Q. Of Juneau? A. Yes.

Q. And he was the former purser of the Ferry Chilkoote? A. Well, he was also manager.

Q. Yes; manager and purser? A. Yes.

Q. During the years 1951 and '52?



(Deposition of Mrs. Minnie Coughlin.)

A. Well, I know he was in 1952. I don't know when he started.

Q. Now, Mrs. Coughlin, when did he die?

A. September 22, 1955.

Q. And who is the administratrix of his estate?

A. I am.

Q. Now, as executrix or his widow, do you have in your possession his personal effects and property?

A. Yes, I do.

Q. Have you made a search to see if you have in your possession, as executrix or his widow, any cancelled checks of the Chilkoot Ferry account for the years 1951 and 1952?

A. I have searched and I have not been able to find any.

Q. I think that is all.

(Reading concluded.)

Mr. Faulkner: Signed "Minnie Coughlin," with the [519] Notary's certificate.

### STEVE HOMER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Faulkner:

Q. Mr. Homer, will you please state your name?

A. Steve Homer.

Q. And where do you live, Mr. Homer?

A. I live in Seattle now.

(Testimony of Steve Homer.)

Q. What are you doing now?

A. I am a student at the University of Washington.

Q. And did you live in Alaska at one time?

A. I lived here for seven years, from 1947 until 1954.

Q. Where? A. At Haines.

Q. Mr. Homer, are you acquainted with the boat Chilkoot that was operated as a ferry between Juneau and Haines? A. Yes, I am.

Q. Did you own that boat? A. I did.

Q. And what became of it? How was it disposed of?

A. Well, in 1951 I sold the boat to a corporation, the Chilkoot Motor Ship Lines, and of which I was one of the stockholders, and then in—about six months later we [520] sold it to the Territory.

Q. In 1951? A. That was in 1951; yes.

Q. And before it was sold to the Territory did you operate it as a ferry between Juneau and Haines? A. Yes, we did.

Q. Are you acquainted with Mr. Robert E. Coughlin who was purser on that boat in 1951 and 1952? A. Yes, I am.

Q. Were you employed on the boat either of those years?

A. I was employed on the Chilkoot as mate in 1952.

Q. 1952? A. Yes.

Q. Did you have any other employment in connection with the Chilkoot in 1952?

A. Well, I continued as agent, as the Haines

(Testimony of Steve Homer.)

agent, for the ferry in 1952, and it started in 1951 with the acquisition of the ferry by the Territory.

Q. Now, in acting as agent what did you do with reference to the collection of freight and passenger money?

A. Well, the agency was to sell passenger space and freight space to whoever desired to travel on the ferry, and we made up manifests and passenger lists and turned them over to Mr. Coughlin, the purser.

Q. Now, at this same time did you act as mate on the boat? [521]

A. During 1952; yes.

Q. And for how long a period—I mean, when were your services terminated?

A. Well, I started to work on the ferry on April 5, 1952, and I was discharged on August 20th.

Q. 1952?

A. 1952; yes.

Q. Now, in the collection of accounts, freight and passenger money, I will ask you how you transmitted that money to the Chilkoot ferry?

A. Well, for each trip we prepared a passenger list and a freight manifest, and I delivered those to Mr. Coughlin, who was the purser on the ship, with a covering check for the amount that was due, less my own commissions.

Q. You gave him a check; you mean, your own personal check?

A. Yes. A check on my agency account.

Q. Your agency account. Where was that kept?

A. That was kept in the First National Bank of Juneau.

(Testimony of Steve Homer.)

Q. I will ask you if you have the cancelled checks that you issued to the Chilkoot Ferry from—during the summer of 1952?

Mr. Nesbett: Your Honor, I wonder if the Court would ask Mr. Faulkner what he intends to prove or how he intends to connect this testimony up with anything relevant to the issues. I have no particular objection to it except [522] that it is time-killing. I, therefore, object to it.

The Court: I would like to be informed, counsel, as to what the relevancy of any check given by this agent to the purser would have in relation to this libel suit.

Mr. Faulkner: If the Court please——

Mr. Nesbett: Your Honor——

The Court: Just a moment. May he answer the question?

Mr. Nesbett: Well, Your Honor, I just want to be heard. Possibly—I don't know what he is going to say—maybe it is another speech for the benefit of the jury, and possibly it should be out of the hearing of the jury.

The Court: An offer of proof may be made in the presence of the jury as long as we do not argue the facts.

Mr. Kay: Your Honor, usually it is at the bench, is it not, because the offer of proof may not be accepted and may never come to the attention of the jury? At least I have always made offers of proof at the bench.

(Testimony of Steve Homer.)

Mr. Faulkner: Well, I am willing to do it anywhere.

The Court: You may make such offer then. Approach the bench, if you will.

Mr. Faulkner: It is in the normal course of the examination.

(Whereupon, respective counsel and the Court reporter approached the bench, out of the hearing of the jury, and the [523] following occurred:)

Mr. Faulkner: I will state—this case concerns the funds of the Chilkoot Ferry and the way they were handled. The purpose of offering these checks is to show that, to show that Mr. Homer was the agent and that he collected revenue and transmitted that revenue to the Chilkoot Ferry, to Mr. Coughlin, as purser, and to show the disposition of the checks. Now, I will state to the Court, that is, the first list of checks I have here will show by their endorsement that they went into the special ferry account which is the subject of this suit.

The Court: Is there any dispute——

Mr. Faulkner: Just a minute, Your Honor. I haven't finished. Then we propose to introduce some other checks that did not get into the special ferry account, didn't get into the public funds at all. I want to show the method, the endorsements on them, and they are issued by Mr. Homer.

The Court: Do you propose to show anyone connected with the Juneau Empire knew anything about it?

(Testimony of Steve Homer.)

Mr. Faulkner: No. I don't think I have to.

The Court: I think you have to.

Mr. Kay: Do you intend to show one penny did not eventually go into Territorial possession?

Mr. Faulkner: I do.

Mr. Kay: How? [524]

Mr. Faulkner: By showing——

Mr. Kay: Let's say he issued a check to Bobby Coughlin and it was cashed at a grocery store. Does that demonstrate what was done? No; not one iota.

Mr. Faulkner: Coupled with Mr. Ehrendreich's audit——

Mr. Kay: It shows it was accounted for.

Mr. Faulkner: No, it doesn't.

The Court: I cannot see where either the audit or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here.

Mr. Faulkner: It is the very heart of the case, Your Honor.

The Court: There is no allegation or charge in the publication regarding any shortage that I am able to find. The charge is that these men wrongfully or illegally disbursed funds without putting them through the treasury. Anything that Coughlin did with regard to the money or this audit is wholly irrelevant.

Mr. Faulkner: I would have to take exception to that because it is the heart of the case.

The Court: It has nothing to do with the case as far as I can see.

(Testimony of Steve Homer.)

Mr. Kay: Nothing.

Mr. Faulkner: I will make a further statement. [525] This connection of the plaintiffs with public funds——

The Court: Well——

Mr. Faulkner: A statement for the record. The purpose is to show that the plaintiffs entrusted public funds to an unauthorized person without a bond and that a considerable portion of those funds were lost to the Territory.

The Court: We are not trying these parties either on any civil or criminal action for unlawful——well——or for failure to account for these funds. The issue here is solely whether this publication is true or false, and this evidence can have no possible bearing on it because nothing is suggested in the editorials or articles regarding a shortage of funds. There is no such charge.

Mr. Faulkner: My understanding of the law from the Restatement of the Law, which I can cite to Your Honor, is that, where an official or anyone else entrusts funds illegally, unlawfully, to another person and where they are lost and embezzled, he is criminally and civilly libel.

Mr. Nesbett: That has no bearing on the issues raised in the pleadings.

The Court: Precisely.

Mr. Faulkner: But——

The Court: In any event, it has no bearing on this case, no bearing whatever. We must confine

(Testimony of Steve Homer.)

the issues to the publication, whether it is true or false. That is all we are [526] concerned with.

Mr. Faulkner: I further offer—I state this because—I might as well state it now—I further offer to prove by Mr. Homer that there were illegal payments made out of this fund; that there was payment to aliens, which is contrary to the Territorial law; that there were advances claimed to have been made in wages which were not made; and that there was a very considerable loss of public funds; and their connection with the plaintiffs is that they expressly authorized the handling of the funds by Mr. Coughlin and that they are responsible for his acts. Mr. Roden stated, and as the proof shows, he was their agent.

The Court: That may be permissible except for this fundamental fact, counsel, and that is this publication charges these plaintiffs with commission of a crime, and that we cannot deny. Even if what you say is true, there would be no criminal liability of the members of the Board for such acts unless it be shown that they were accessories to it, and there is no such charge in the publication. We cannot go into something which is wholly collateral. There is no action against plaintiffs for diversion of funds.

Mr. Faulkner: They brought the action themselves on the article which refers to diversion of funds, diversion of funds out of the normal channel provided by law into an unauthorized person's hands who lost the funds. [527]



(Testimony of Steve Homer.)

Mr. Nesbett: There is nothing about lost funds.

The Court: There is nothing whatever in the published publication inferring or in any way mentioning any loss of funds.

Mr. Kay: That is right.

The Court: Therefore, it is not in issue in this case.

Mr. Faulkner: That is true, but the law is that the truth of the facts whenever and wherever discovered are admissible as a defense.

The Court: Such issue would have no relation to the truth or falsity of the libel—nothing.

Mr. Faulkner: Well, I don't think I can ask Mr. Homer any questions under the ruling of the court, and again, I would have to except to Your Honor's ruling.

(Whereupon, respective counsel and the Court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:)

The Court: The objection of the plaintiffs to the last question to the witness Homer will be sustained, and the offer of proof made by counsel is denied on the grounds that it is not relevant to the issues of this case.

Mr. Faulkner: I just wonder if in connection with the offer I shouldn't offer the exhibits I was going to offer through Mr. Homer. [528]

The Court: If you wish.

(Testimony of Steve Homer.)

Mr. Faulkner: I think perhaps I better have the reporter come up——

The Court: Well, that could make no difference. You may offer them. It would not be necessary to identify them. Your offer is denied for the reasons stated, because it would be irrelevant, so, whether it is sufficiently identified or not, it makes no difference because they are irrelevant.

Mr. Faulkner: I think I stated in the objection—I mean, in the offer—what we intended to prove by these checks.

The Court: Yes; that is understood.

Mr. Faulkner: If that is understood, it is all right.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Steve Homer resumed the witness stand, and the Direct Examination by Mr. Faulkner was continued as follows:)

Q. Mr. Homer, there have been—there has been some testimony here about a check that was issued to you for \$398.04 on B. M. Behrends Bank, signed by Robert E. Coughlin—“Chilkoot Ferry, Robert E. Coughlin.” I will ask you if the check I hand you is the original of that check?

A. Yes, it is. [529]

Q. And what was the purpose of that check? What was it for?

(Testimony of Steve Homer.)

A. This check was for the payment of overtime that was due me through the entire period of the summer.

Q. And the check shows the date it was issued?

A. It does.

Q. The original check? A. It does.

Q. And does it show what happened to it—I mean, with reference to payment through the Behrends Bank?

A. There is a notation on there that—by Mr. Dunn who is—I don't know his capacity; he is an officer in the bank—that he made on the check, when I presented it, that the account had been closed.

Mr. Faulkner: You have seen this?

Mr. Nesbett: No; I haven't seen the original.

Q. (By Mr. Faulkner): Mr. Homer, the check, you say, has a notation by Mr. Dunn of B. M. Behrends Bank that the account was closed and the "balance transferred as per authorization." Now, when did you present this check to the bank?

A. I believe it was about the 26th or 27th of August.

Q. The 26th or 27th of August. And that is the notation the bank put on the check? A. Yes.

Mr. Faulkner: We will offer this check in evidence [530] as Defendant's Exhibit.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit N.

Mr. Faulkner: Now, if the Court please, I want to ask the witness another question about some other checks, but I think that it is no more than fair

(Testimony of Steve Homer.)

that we should take this up with the Court first and state the purpose of it.

The Court: Very well.

Mr. Faulkner: These are different checks from the ones I had before.

(Whereupon, respective counsel and the Court reporter approached the bench, out of the hearing of the jury, and the following occurred:)

Mr. Faulkner: The defendant offers now through this witness a series of checks issued by him as agent of the Chilkoot Ferry, dated in August, 1952, payable to the Chilkoot Ferry, on the First National Bank of Juneau, in the sum of something over two thousand dollars, which did not go through any Chilkoot Ferry account at the B. M. Behrends Bank.

Now, the Court's former ruling might be considered to cover this, but I offer these checks at this time to refute the statement of Mr. Roden that they continued to operate under this Chilkoot Ferry fund after Mr. Homer's check was presented at the bank and refused and after Neil Moore closed the account. Mr. Roden said they continued. [531]

The Court: Can't that be shown without the checks?

Mr. Faulkner: These checks show they didn't get into B. M. Behrends Bank at all.

The Court: You can rebut the testimony of Mr. Roden as to whether the ferry was operated after this date——

(Testimony of Steve Homer.)

Mr. Faulkner: He said it was.

The Court: These can be offered only for the purpose previously indicated. Attempting to show Mr. Coughlin did not account for all money turned over to him, that we find is wholly irrelevant here for the reason that nothing was suggested in the publication on which the suit was based, regarding shortage of funds.

Mr. Faulkner: These are offered, in addition to the reasons for which I attempted to offer the other checks, to refute Mr. Roden's statement that the ferry fund at B. M. Behrends Bank was continued and not closed on August 25, 1952.

The Court: These checks can have no bearing on such proof. It may be shown without the introduction of the checks in August.

Mr. Faulkner: One witness testifies that the account was closed, and another, for plaintiff, testifies it was not.

The Court: Closed after the date of this publication. These checks are previous dates.

Mr. Faulkner: No; closed before a month before, closed a month before. [532]

The Court: Yes. Excuse me. Supposed to be closed on instructions from Auditor Moore and John Dimond; but it was surely prior to August, 1952.

Mr. Faulkner: No. It was August 25, 1952. Those checks show they were cashed September 4th, I think, on the back of it.

(Testimony of Steve Homer.)

Mr. Nesbett: What purpose they can show, I can't conceive.

Mr. Faulkner: To contradict Mr. Roden that——

The Court: I can't see where the offer of the checks, showing they were paid September 4th, has anything to do with the contradiction of Mr. Roden's testimony. They can be offered only on the issue of whether Mr. Coughlin had a shortage of funds, and that is not in issue here.

Mr. Faulkner: We take exception, Your Honor.

(Whereupon, respective counsel and the Court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:)

Mr. Faulkner: I think that is all, Mr. Homer.

Mr. Kay: May we have just a moment?

Mr. Nesbett: No questions.

The Court: That will be all then, Mr. Homer.

(Witness excused.)

Mr. Faulkner: If the Court please, I think that concludes our testimony, but I would like some time to confer [533] with Mrs. Monsen regarding the matter that the Court has under advisement. That will take a little time because she is here without any records, and this comes on suddenly, and she will have to go through her—whatever files she has, and she doesn't have any. We don't have a copy of the contract with us. Counsel has.

Mr. Kay: May I suggest this, your Honor, that

it is now nearly 11:30; we could lend Mr. Faulkner, and be glad to do so, our copy of the contract; and it may be that by taking this half-hour for three purposes—Mr. Faulkner to confer with Mrs. Monsen; Your Honor to consult these authorities; and ourselves to consult with the plaintiffs—that we may shorten rebuttal to a very, very few minutes, and then we could proceed further with the case this afternoon; if Your Honor would care to take that into consideration and recess now.

The Court: Well, supposing, if we get a half-hour off this hour, we resume at 1:30.

Mr. Kay: 1:30. Very good.

The Court: Very well.

Mr. Faulkner: Your Honor, I have never seen this contract, and I am grateful to counsel for lending it to me. I wasn't here when it was drawn and I don't know anything about it, and so we would have to go over it and get what we can from that and from Mrs. Monsen personally.

The Court: Well, we have just stated we will recess [534] the case then until 1:30.

Mr. Faulkner: I am sorry I had to ask for that.

The Court: That is perfectly all right, if you need the time.

(Whereupon, the trial was recessed until 1:30 o'clock p.m., November 18, 1955, and resumed as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom; whereupon the trial proceeded as follows:)

The Court: During the noon recess the Court has had an opportunity to go into this question that was raised with regard to the proof of the financial status of the defendant.

I do find that there is apparently ample authority, that is, great weight of authority, sustaining such proposition, that is, only in the case where there is the element of punitive damages, and it seems to be held in a great many decisions, state courts and United States Courts as well, that the defendant's financial condition is a proper consideration for the jury in awarding punitive damages in an action for libel and slander and that the plaintiff may introduce evidence to aid the jury in determining the defendant's financial status. The annotations in 34 A.L.R., beginning at Page 8, fully support the doctrine.

In the case in which my attention was directed to the Supreme Court of California, 184 Pacific 672, the question does not appear to have been directly raised except on a [535] motion for new trial, but the plaintiff there was permitted to testify as to the value of the defendant's property, which he said was worth over two million dollars, and then the Supreme Court considered the question of whether that testimony may have resulted in an excessive verdict because of passion or prejudice and held that it did not and denied the motion for new trial. Apparently the testimony was admitted without objection.



In the case of *Washington Gas and Light Co. v. Lansden*, 172 U. S. 534, the Supreme Court at least strongly indicates the rule as being applicable but holds that, if the evidence of wealth of one defendant in a libel case would be admissible against the defendant corporation alone for the purpose of enabling the jury to calculate exemplary damages, such would be inadmissible as against other defendants who were also joined, and they make that distinction. I find also some distinction is made as to the degree of proof. Some decisions hold that reputation of financial circumstances is proper or in some cases sufficient. I don't think that is the proper rule, and, even though it may be the majority rule, I think the better rule is that proof should be limited to actual means. I also find, however, that such proof should be general only and that the Court and the jury should not be entitled to try any collateral issue with regard to such wealth.

In view of that fact, I doubt whether the contract [536] may be admitted in evidence. I also doubt whether there may be a question of privilege as to the contract, because it would involve a collateral issue, and I think the questions put to Mrs. Monsen as to the value of the property appear to be fair and proper in the case of punitive damages. Actually, however, I believe that such evidence would be—well, if it is prejudicial at all, it would be against the plaintiffs rather than the defendant.

Mr. Faulkner: If the Court please, we will take exception to Your Honor's ruling admitting the evidence, but in admitting it it will be necessary for

Mrs. Monsen to testify to the sale price, to the debts assumed, to the debts paid out of the portion that she received, and the balance due. Now, that is the way I should think you would have to arrive at it.

The Court: Well, I presume so.

Mr. Faulkner: We will have to go into that. She couldn't say just offhand what it is worth without giving the Court and the jury the figures, and she could be cross-examined on that.

The Court: I presume so. If reference to the contract is necessary for Mrs. Monsen to give that information, then it may be referred to, but I still doubt whether the contract itself should be in evidence, so, if you do that, we simply confuse the jury on some collateral issue, which we are trying desperately to avoid. [537]

Mr. Nesbett: Your Honor, I gave Mr. Faulkner a copy of the contract which I got from the U. S. Commissioner in Juneau on certification, and I will stipulate with him that the only question that may be put and the only answer that need be given is that the Empire Printing Corporation was sold for a net——

Mr. Kay: The assets.

Mr. Nesbett: ——the assets of the Corporation were sold for a net approximately \$175,000.00 after considering the debts assumed by the purchaser, and that is all set out in the contract which I have here, if Your Honor would like to go over it.

Mr. Faulkner: No, we can't do that, Your Honor, because that was sold subject to a great

many other debts which came out of \$175,000.00 We couldn't very well admit anything like that. We went over the contract at noon because we didn't have any copy here, and I see that I signed it as secretary at that time, but I had nothing to do with drawing it and didn't know its contents at all, and then we telephoned to Juneau to verify some of these figures with the accountant, Ehrendreich, and we have got the figures here all right, but we don't want to have the jury misled by what happened. We want to tell the jury what the sale price was, how much was paid on that sale price and what became of that; that was used to pay debts—it wasn't distributed—and for the taxes; and [538] then how much indebtedness the purchaser assumed out of the sale price; and then that will give you what is remaining.

Mr. Kay: Well, what is the net? Maybe we can just ask that question.

Mr. Faulkner: No; I don't want to do that because I think that would be misleading. The net—

Mr. Kay: What would be misleading about the net?

Mr. Faulkner: The payments of the remainder, which would be the net, are scattered over a period of ten or twelve years in payments, and there is nothing due, as I understand it, until 1956—I mean—yes, November, 1956, on the purchase price. And I think Mrs. Monsen had better—it will only take

a few minutes; she has the figures here—just what the sale price was, how much was paid and what was done with that, and how much indebtedness was assumed, and then what there is left and how that is payable. She hasn't got it in her pocket. It is coming in over a long period of years.

The Court: Then the testimony will be limited, as briefly as possible, to that necessary to explain that.

Mr. Faulkner: Yes. She has made notes and verified it over the telephone.

The Court: Well, that, I expect, will need to be done if you are unable to stipulate as to that matter.

Call in the jury, please.

(Whereupon, the jury returned and all took their [539] places in the jury box.)

The Court: On the matter on which the Court reserved decision as to the objection raised to the question put to Mrs. Monsen concerning the sale price of the assets of the Empire Printing Company, the Court finds upon a careful review of the authorities on the question that such evidence is admissible relating only to the matter of punitive damages; that is, if the jury in such a case finds that punitive damages may be assessed in accordance with the instruction of the Court, they may be guided in arriving at the amount of such damages in part by the financial circumstances. What is punitive damages will be fully explained to the jury.

With that in mind, the objection made to the question is now overruled, so that you may then recall the witness. You may as well recall, if you wish, on further cross-examination, or recall on rebuttal.

Mr. Faulkner: Do you want to recall her on cross-examination?

Mr. Nesbett: Yes. Your Honor, pardon me.

### HELEN MONSEN

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

#### Cross-Examination

By Mr. Nesbett:

Q. Mrs. Monsen, I believe you testified previously, did you [540] not, that the assets of the Empire Printing Corporation had been sold to Mr. Allen? A. Yes.

Q. Do you recall the date on which that sale was made?

A. The sale was made June 1st. I don't know what the date of the contract is.

Q. And can you state to the Court and the jury the total sales price of the Empire Printing Corporation, Mrs. Monsen, in that sale?

A. Yes. Can I go ahead and give the whole—

Q. Just answer the question please.

A. Pardon me.

Mr. Faulkner: I think Mrs. Monsen ought to be

(Testimony of Helen Monsen.)

permitted to refresh her memory from the notes she made during the recess. That was the purpose of it.

The Court: Well, the question was purely as to the total sales price. If you need to refer——

A. The total sales price was \$235,000.00, and Mr. ——we assumed all of the——

Q. Well, Mr. Faulkner will be able to question you too. Now, Mrs. Monsen, it is true, is it not, that that sales price of \$235,000.00 excluded from the sale cash which the corporation had on hand at the time and all securities, stocks and bonds issued by any corporation, all land owned by the corporation outside of Juneau, a Chevrolet [541] automobile, and cash advances made to employees, and the corporate books, did it not?

A. Yes. May I ask a question?

Q. No. Mr. Faulkner will examine you. And what land, Mrs. Monsen, did the corporation own outside of Juneau at the time of the sale, which was excluded?

A. A lot near Salmon Creek.

Q. Do you know the size of that lot?

A. Well, I don't know. I think it is fifty feet.

Q. And are there any buildings on the lot?

A. No.

Q. Is it near the roadhouse or——

A. No. It is just a small lot in, I think they call it, the Woodford Addition. Mr. Metcalf could probably tell you that.

Q. Do you know how much cash the corporation had on hand at the time of the sale?

(Testimony of Helen Monsen.)

A. I do not.

Q. Do you know approximately?

A. No, I don't.

Q. And can you state generally what securities, stocks and bonds were issued by the corporation that were on hand and excluded?

A. Yes. We had \$250.00 in the Pelican Corporation, of which Mr. Roden, I believe, is chairman of the board. Is that [542] it, Mr. Roden?

Mr. Faulkner: What corporation?

A. Pelican. And \$2,500.00 in the Community Building.

Q. (By Mr. Nesbett): What was the value of the Chevrolet that was excluded; do you know?

A. \$900.00, I believe.

Q. Were there any—do you know the amount of cash advances that had been made to employees?

A. No. We had to mark those off the books. They were employees to whom we had loaned money.

Mr. Nesbett: That is all.

### Redirect Examination

By Mr. Faulkner:

Q. Mrs. Monsen, in this sale price of \$235,000.00 what of the indebtedness of the Empire Printing Company was assumed by the purchaser to be paid out of that sum?

A. We owed the bank——

Q. Well, just the total?

A. The total sum is \$59,528.00.

(Testimony of Helen Monsen.)

Mr. Kay: Fifty-nine thousand and——

A. And five hundred and twenty-nine dollars.

Q. (By Mr. Faulkner): And that left a then balance, taking that from \$235,000.00, of \$175,471.00? Is that right? A. Yes, sir. [543]

Q. Now, of that amount how much was paid down at the time of the contract?

A. \$50,000.00.

Q. And that would leave then how much?

A. \$125,471.00.

Q. And now, of the fifty thousand what—how was that disposed of, the amount that was paid down?

A. Over \$30,000.00 went to taxes, Federal and Territorial taxes, and they have not all been paid as yet, and about \$10,000.00 to accounts payable, because Mr.—is that all right?

Mr. Kay: Certainly.

A. Mr. Allen—the payments were cut off as of June 1st, and he had our accounts receivable, and we had the accounts payable, and the money we had on hand did not cover all of the accounts payable.

Q. And you had then a liability of ten thousand, you say?

A. About ten thousand; that would have to be approximate because—I don't know; and a cancellation of King Features Service, which cost us \$600.00; and our—we just made Mr. Ehrendreich one payment, I believe, of about three hundred and seventy-five, but that is only a guess; I don't know. Mr. Banfield had a fee of about \$700.00; that is also an



(Testimony of Helen Monsen.)

approximate. Then we withheld the expenses of witnesses and attorney's fees for this case of \$5,000.00. [544]

Q. That is your expenses? A. Yes.

Q. And what does that total?

A. \$47,275.00.

Q. That leaves of the fifty thousand paid how much? A. \$2,725.00.

Q. Now, then you still have due, you said, \$175,481.00. How was that payable?

A. There is no payment on the principal until November 1, 1956. That is sixteen months after the contract. During that sixteen months interest at 5% is paid, and that totals \$523.00 a month, and that is divided between my sister and myself so that I think she has about \$154.00 a month and my income is \$369.00 a month. November 1, 1956, Mr. Allen will start paying the remainder over a period of thirteen years in 144 payments at \$700.00 a month.

Q. Beginning when, did you say?

A. November 1, 1956.

Mr. Nesbett: Is that plus interest?

A. I think there is interest on that, too.

Mr. Nesbett: 5%?

A. 5%; and a decreasing interest.

Q. (By Mr. Faulkner): Decreasing as the payments are made?

A. Yes. And the balance is due of \$24,671.00 on November 1, [545] 1968.

Q. 1968. And then on June 1st Mr. Allen took

(Testimony of Helen Monsen.)

over this property?           A. Yes; he took over.

Q. And has it now. Now, you say—Mr. Nesbett asked you about what you had in the bank, and you said you didn't know. I will ask if at the time of the sale you owed the bank in Juneau, one of them—I don't know which one—some money?

A. We owed the First National Bank \$36,000.00. We were paying off at \$500.00 a month, and Mr. Allen assumed that.

Q. That was part of the fifty-nine thousand?

A. Yes, sir.

Q. That he deducted from the purchase price?

A. Yes.

Q. Now, then you said you had liabilities of approximately \$10,000.00. Does that mean \$10,000.00 over and above any cash you might have had in the First National Bank?

A. Yes. That is an approximate figure.

Q. Do you think it is more or less?

A. I think it is probably more than that. We had—I wish I were prepared.

Q. Well, that would be after deducting your bank account—that is what I am talking about—whatever bank account you had? [546]

A. Yes.

Mr. Faulkner: I think that is all.

The Court: Very well then, Mrs. Monsen—do you have further questions (addressing plaintiffs' counsel)?

Mr. Nesbett: Your Honor, I may have a question. Will you pardon us just a moment?

(Testimony of Helen Monsen.)

Recross-Examination

By Mr. Nesbett:

Q. Mrs. Monsen, there is a balance due now, or as of June 1st, on that sale of one hundred twenty-five thousand four hundred some-odd dollars; isn't there?      A. Yes.

Q. And you realized \$2,725.00 out of the down payment?

A. That was only an approximation; I don't know.

Mr. Nesbett: That is all.

Mr. Faulkner: Just a minute.

Redirect Examination

By Mr. Faulkner:

Q. Mr. Nesbett said was due on June 1st. I think you better clarify that. That is due——

Mr. Nesbett: As of June 1st.

Q. (By Mr. Faulkner): And that is due on the dates you gave?

A. Yes. It is payable over a period of thirteen years, I [547] believe.

Mr. Faulkner: That is all.

Mr. Nesbett: That is all.

The Court: That is all, Mrs. Monsen.

(Witness excused.)

Mr. Faulkner: Now, if the Court please, I am

going to call Mr. Leivers, the Clerk of the Court, for one or two questions.

The Court: I can swear you, I think, Mr. Leivers.

J. W. LEIVERS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Faulkner:

Q. Mr. Leivers, you are the Clerk of this Court. How long have you lived in Alaska?

A. Since 1908.

Q. And where? A. Juneau and Douglas.

Q. And during that time—that would be some 46-47 years—have you known H. L. Faulkner, attorney for the defendant in this case?

A. Yes. I believe I knew you, not intimately, back when you were U. S. Marshal around '13 or '14, somewhere along in there. [548]

Q. And since then have you known me quite well since you have lived in Juneau?

A. Yes; I guess I can say that I have become intimately acquainted with you since I came into the Office of the Clerk of the Court in 1929.

Q. And have you been associated with me in various capacities up there, such as lodge work and church work? A. Yes, sir.

Q. And of course in your daily work as Clerk of the Court and as Deputy Clerk before you were appointed Clerk? A. Yes, sir.

(Testimony of J. W. Leivers.)

Q. And that extends how far back, your service in the Clerk's Office?

A. Back to 1929; March, 1929.

Q. And in that time and that acquaintance have you ever at any time or place heard H. L. Faulkner use profane language?

A. No, sir; I have not.

Mr. Faulkner: That is all.

Mr. Kay: No questions.

Mr. Faulkner: I think the defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Kay: We will call Governor Gruening for just a few questions. [549]

### Plaintiffs' Rebuttal

#### ERNEST GRUENING

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

#### Direct Examination

By Mr. Kay:

Q. Governor Gruening, there have been just a few things which have come up in the defense which I think we ought to try to clear up a little bit. The defense have raised several examples in which they said that—which they gave as examples of their honest differences of opinion with you on matters of public affairs. For example, one of the witnesses for the defendant testified that it was, one of the items in

(Testimony of Ernest Gruening.)

which she opposed you, was that she believed that you were intellectually dishonest on statehood, on your support of statehood. Is that a fact, Governor Gruening?

A. Well, I don't know how I can do more than state most emphatically that I fervently and firmly believe in statehood for Alaska, that I have for many years, that I have written many articles on the subject, that last year I published a book called "The State of Alaska," which gives a long list of reasons, gives the whole history of the statehood movement, and the reasons for it, and it is one of the causes I believe in most profoundly as essential to the future development of our Territory.

Q. Can you think of any reason, Governor, any foundation, [550] for anyone to believe that your position in that regard was intellectually dishonest?

A. Not if they were at all acquainted with the facts and had known how consistently I had supported statehood on every possible occasion, publicly, privately, in the States, throughout the Territory, on the platform, in my writings, and everywhere.

Q. Now, other examples, I believe that two other examples were mentioned, Governor Gruening. One was a difference of opinion or differences of position between the publishers of the Empire and yourself with reference to the Senate investigation into the Union Bank in 1947, and the other a difference of opinion between the publishers and yourself on the matter of the construction of the Palmer Airport. In presenting the examples which you gave of what

(Testimony of Ernest Gruening.)

you termed a campaign against you by the Empire, was your testimony tended, I mean, intended to imply that you objected to the right of the Empire in any way to disagree with you?

A. Certainly not. It is the function of a paper to express itself editorially on public questions, and it has a perfect right, even the duty, to disagree with public officials when it so felt. What I did consider most unfair was the character of the abuse, the abusive terms which they applied to me, the sneering, slandering [551] epitaphs, and the fact that they disagreed with me not merely on the few things mentioned but on practically everything. Apparently, I couldn't do anything right as far as the Empire was concerned.

Q. You mean to say they disagreed with you on everything. Then I take it that your opposition or your displeasure over that was not a thing of their right to disagree with you in any way but only on the manner of its expression?

A. Absolutely. I have been a newspaper editor myself of various newspapers, and I have frequently disagreed with public officials, but I would state those in moderate language, trying to have the facts and the logic convey the basis of my criticism. I never applied epitaphs to the people I was criticizing.

Q. Governor Gruening, I will show you—these are editorials which were shown to Mrs. Monsen this morning but which she was unable to identify; I will just offer the first one, labeled “The Return of ‘Alibi Ernie.’”

(Testimony of Ernest Gruening.)

A. Well, this is an example of what I mean.

Q. Is that an editorial printed in the Alaska Daily Empire on the date it bears?

A. On March 15, 1952; yes.

Q. And I will show you an editorial entitled "The Artful Dodger," Wednesday, July 9, 1952, and ask you if that is an editorial which appeared in the Alaska Daily Empire on [552] the date it bears?

A. Yes. This is entitled "The Artful Dodger" and begins by saying "Agile Ernie, the artful dodger, again"——

Mr. Kay: Now, I will offer them in evidence—without objection.

The Court: They may be admitted.

The Clerk: These will be Nos. 13 and 14 in the order they were presented.

Q. (By Mr. Kay): The only other item that I can recall, Governor, is that you were also criticized, or an implication was made that the Empire was fair to you by not publishing or not commenting editorially on the fact that you were absent from Alaska at the time of a steamship strike—I don't recall the date of the strike—you as well as a number of others. Will you comment on that, sir?

A. Well, I was on frequent occasion absent from Alaska. Part of my duty was to go to Washington. I was frequently summoned to Washington by Federal officials, by Congressional committees, to appear at hearings, to appear before boards, and, since



(Testimony of Ernest Gruening.)

we have only a voteless delegate from Alaska, he more than welcomed the assistance of someone else to come down there and testify in behalf of certain measures, and those visits were on official business, and they were for the benefit of the Territory.

Q. Did you, as a matter of fact, take as active a part as [553] you could in the settlement of that particular strike?

A. I took an active part in attempting to settle practically every strike that occurred, but in any event, if I had not been here in Juneau physically, the Acting Governor was always there. My office did not cease to function because I happened not to be in Juneau at any particular time.

Q. The Secretary of Alaska, the Acting Governor, was here and discharging your duties in your absence from the Territory?      A. Yes.

Q. The editorial of March 15, 1952, I am not going to read all of it by any manner of means, but it will be available to the jury. It is offered, again, as an illustration only. It is entitled "The Return of 'Alibi Ernie,'" "Alibi Ernie'" being in quotes.

"On his return from Washington, Alaska's part-time governor was ready with the usual alibis for the latest failure of the statehood bill.

"As usual, the alibis are specious and backed by the usual phony statistics."

The editorial of Wednesday, July 9, 1952, is entitled "The Artful Dodger." It begins: "Agile Ernie, the artful dodger, again managed to sidestep comment on the notorious Palmer Airport

(Testimony of Ernest Gruening.)

deal." And concludes: "We hope, however, that the people of Alaska will read and remember. [554] We hope that they will become aware of the rottenness of the Gruening administration and take positive steps to put Alaska's house in order. The October elections offer a fine beginning."

Who was the "Artful Dodger"?

A. The "Artful Dodger" was a well-known character in a classic novel by Dickens called "Oliver Twist." He was a pickpocket. He was a thief. He was a member of "Fagan's Gang, who was pictured in this book "Oliver Twist" as going out and picking people's pockets and trying to teach Oliver Twist, who had been conscripted into this gang, to do the same thing.

Mr. Kay: No further questions.

### Cross-Examination

By Mr. Faulkner:

Q. Governor, you heard Mrs. Monsen's deposition regarding your attitude on statehood, which you just mentioned, I believe, where you just referred to the fact that she said your attitude on statehood was intellectually dishonest? You heard the deposition read?

A. Well, I remember that statement.

Q. Do you remember that is where you got it, from listening to the deposition?

A. I don't remember where it was made. [555]

Q. It was either from her deposition or her testi-

(Testimony of Ernest Gruening.)

mony? A. Will you refresh my memory?

Q. Well, I think it was in the deposition, Governor. A. She stated it in the deposition?

Q. Yes. Well, what I was going to ask you was, don't you recall that she said she was repeating hearsay that Colonel Olson and Mr. Rasmusson said when she used that language?

A. That Colonel Olson and Mr. Rasmusson said so?

Q. Yes. A. About me?

Q. Yes. That is what her deposition was, not her direct accusation, but she was repeating theirs. Do you recall that in the deposition?

A. Which Mr. Rasmusson was that?

Q. The senior Rasmusson.

A. Who is now dead?

Q. Yes.

A. I doubt very much if he ever made any such statement. He was an honorable man.

Q. But that isn't the question, Governor. Do you recall that, when she said that in the deposition, she was quoting them, Colonel Olson and Mr. Rasmusson; she said she was quoting them?

A. Well, then she doesn't believe it herself?

Q. I don't know. She didn't say so. Now, Governor, during [556] the incident of that steamship strike in 1952—I think you maybe misunderstood that—there wasn't any charge made against you particularly for being out of the Territory at that time, was there?

(Testimony of Ernest Gruening.)

A. Well, I don't know just what the charge, that the defendant makes, is. Something was said.

Q. It wasn't a charge at all, Governor. It was testimony that six or seven important officials were absent from the Territory at that time. It was just a statement of fact. A. That might well be.

Q. Yes. So there was no charge of your wrongdoing there so far as wrongdoing is concerned, was there?

A. Well, I think it was assumed that, as long as the defendant brought it up, that it must be in the nature of a criticism.

Q. Well, yes, you assumed that, but they weren't all in the nature of criticism.

A. Well, all right.

Q. What I was trying to get at, Governor, and I think the testimony shows that all of these officials were out of the Territory at the time of the strike and the Chamber of Commerce had to advance money to hire a lawyer in Seattle to represent the interest of the Territory, which might not have been necessary if all of these officials [557] or some of them had been here.

A. Well, you realize, don't you, that the Attorney General is an elected official and is not responsible to the Governor. He is only responsible to the people, and, therefore, he being the official who would take charge of that, I have no responsibility for him.

Q. That is true, Governor, and what I wanted to clear up in your mind is, you understand the testi-

(Testimony of Ernest Gruening.)

mony didn't accuse you of having any responsibility— A. I am happy to hear that.

Q. —in that respect. It was just simply the fact that—all the testimony shows is the fact that so many officials were out of the Territory at the time. That is all. You understand that, don't you?

A. Yes.

Mr. Faulkner: I think that is all, Your Honor.

The Court: That is all then, Governor.

(Witness excused.)

### HENRY RODEN

called as a witness on behalf of the plaintiffs, having previously been duly sworn, testified as follows:

#### Direct Examination

By Mr. Nesbett:

Q. Mr. Roden, you have heard the testimony concerning the location of various Territorial officials at the time the [558] Alaska Steamship strike occurred, have you not? A. Yes, sir.

Q. Where were you at the time that strike occurred? A. I was in Juneau.

Q. And do you know where Attorney General Gerald Williams was?

A. He was in San Francisco appearing before the Circuit Court of Appeals.

Q. On Territorial legal business?

A. That is right.

Q. And I will ask you whether or not you your-

(Testimony of Henry Roden.)

self on behalf of the Territory went to Seattle to represent the Territory's interest in connection with that strike?      A. I did.

Q. And what, briefly, did you do in that connection?

A. The lawsuit had been commenced by the Alaska Steamship Company against the Seattle Longshoremen's—

The Court: Pardon me, counsel, before we go into that. Aren't we getting off the track again into something that is collateral?

Mr. Nesbett: It might be collateral to begin with, but we don't like the jury to have the impression that everybody was asleep at the switch.

The Court: Well, very well.

A. Well, the suit, as I say, had been commenced by the [559] Alaska Steamship Company against the Seattle Longshoremen's Union. The question was whether or not the Territory might find a position in the lawsuit, in other words, as the lawyers call it, whether or not we could intervene. We got in touch with a Seattle law firm—I did—and they said in their opinion we could intervene. Then I called up the Attorney General in San Francisco and told him about the situation, asking him to come to Seattle and represent the Territory. He said he could not come, and he deputized me to go down there and represent the Territory, and I did represent the Territory and participated in the prosecution of the suit, which we won.

Q. Mr. Roden, you heard Mr. Daum's testi-

(Testimony of Henry Roden.)

mony with respect to the articles appearing on the front page of the September 25th publication of the Empire, entitled "Roden, Metcalf Say 'Nothing Crooked' Here," to the effect that you were interviewed as well as Mr. Metcalf prior to this publication. I will ask you whether or not Mr. Daum did interview you prior to this publication in which he quotes you as saying "'Nothing Crooked' Here"?

A. I never used the expression "Crooked," never used it in my life.

Q. Mr. Roden, I will ask you again whether or not Mr. Daum interviewed you with respect to the printed article "'Nothing Crooked' Here" prior to its publication? [560]

A. He did not.

Q. Are you positive? A. I am positive.

Q. And, if he testified that he did interview you, and prior to the publication, and that you, as well as Mr. Metcalf, said "'Nothing Crooked' Here," would he be incorrect in your opinion?

A. He would be incorrect.

Mr. Nesbett: No further questions.

### Cross-Examination

By Mr. Faulkner:

Q. Mr. Roden, do you mean to say that Mr. Daum did not come to you to discuss this matter prior to the publication?

A. He came to me the first time on the 26th of September, the day after the publication.

(Testimony of Henry Roden.)

Q. Did anybody else come to you about this?

A. Not that I know of.

Q. Well, did Mr. Homer come to see you?

A. No. Well, let me explain this. Mr. Homer came to see me about a half a dozen times a week. He had always some complaint about something. He was either in difficulties with the Coast Guard about something, about this or that, or this or that didn't suit him. In other words, Mr. Homer, having lost the ferry, was trying to do his best [561] to devise some scheme to get it back, and I, being the old man——

Q. Just a minute.

A. ——he came to me and, so to speak, wept on my shoulder about this and that and everything else.

Mr. Faulkner: Just pardon me. I think we will have to object to the testimony of the witness as opinion and argument to the jury.

The Court: The opinion may be stricken.

Q. (By Mr. Faulkner): Mr. Roden, you say Mr. Homer came to you frequently. Didn't he come to you and complain to you about the way the purser was handling the ferry funds? A. No.

Q. Didn't he complain to you about the practice that was being followed with reference to deductions from the crew—the wages?

A. Yes. He complained about deductions for the food they were supposed to be getting.

Mr. Nesbett: Your Honor, as long as you have stricken Mr. Roden's answer as being irrelevant, I



(Testimony of Henry Roden.)

see no reason for Mr. Faulkner to pursue the same subject further, again.

Mr. Faulkner: Mr. Roden said Mr. Homer came to him and complained, and I was objecting to his argument about Mr. Homer and the Coast Guard and weeping on his shoulder and always something to complain about. I am asking him what he [562] complained about with respect to——

The Court: Counsel, I do not recall any questions asked of Mr. Roden on direct examination about Steve Homer. Did you ask any questions about Steve Homer?

Mr. Nesbett: I did not; no, Your Honor.

The Court: Well, then where is this proper cross-examination at all?

Mr. Faulkner: Well, Your Honor, of course it is. Mr. Roden said, Your Honor, that nobody complained—that was in his direct examination in chief—that nobody ever complained about this ferry.

Mr. Kay: The subject was whether anybody came to him concerning the—whether Jack Daum came to him concerning the publication.

The Court: That is all that I heard.

Mr. Faulkner: I asked him if anybody else came to him, and he said yes, Steve Homer.

Mr. Kay: Steve Homer wasn't employed by the Empire.

Mr. Faulkner: That is all right. Mr. Daum testified that Steve Homer brought these complaints to him.

Mr. Nesbett: The fact still remains, Your

(Testimony of Henry Roden.)

Honor, that he objected to the answer, and it might not have been quite responsive. Your Honor ordered it stricken.

The Court: Well, I said his opinion.

Mr. Nesbett: And now he pursues the subject after [563] his own objection.

The Court: Well, strictly speaking, it is not proper cross-examination. However, I feel it is not a serious error to permit the questions to be answered so far as they may be wholly relevant and material.

The last question was what, Miss Maynard, if you can find it?

The Court Reporter: The last question was answered.

The Court: Well, then what are we considering?

The Court Reporter: "Q. Didn't he complain to you about the practice that was being followed with reference to deductions from the crew—the wages?" "A. Yes. He complained about deductions for the food they were supposed to be getting."

The Court: The Court holds that that evidence is irrelevant and immaterial, and the answer may be stricken.

Mr. Faulkner: That what?

The Court: That it is certainly irrelevant and immaterial, and the answer may be stricken.

Mr. Faulkner: As I understand the rule, Your Honor—I want to get it clear—we don't have to take exceptions.

(Testimony of Henry Roden.)

The Court: Well, counsel, here is the point. You are not precluded from asking him if there were any complaints made about the use of this fund.

Mr. Faulkner: No, Your Honor.

The Court: But to go into something else about the [564] food, what has that got to do with this case?

Mr. Faulkner: It definitely is material, Your Honor, but I am not complaining about that. I am just asking a point of information. I don't want to be taking up the Court's time and the reporter's time with taking exceptions if they are not necessary.

The Court: No; no exceptions are necessary.

Mr. Faulkner: No. That is all, Mr. Roden. That is all.

Mr. Nesbett: The plaintiffs rest, Your Honor.

The Court: I presume there would be no surrebuttal, or do you suggest any, Mr. Faulkner?

Mr. Faulkner: Pardon me?

The Court: Do you require any surrebuttal?

Mr. Faulkner: Pardon me just a moment. No, I think not, Your Honor.

The Court: The matter of the preparation of the instructions in this case has been one involving considerable labor, and it is very difficult to complete such instructions immediately upon the conclusion of the evidence. The Court will need a little further time to complete such, and I think it best that we do that before we proceed to argue this

case. In fact it might be helpful to counsel if we could get copies of the instructions in their hands before argument, although we are not required to do so. [565]

Mr. Kay: We certainly would appreciate it, if the Court please.

The Court: Also, there have been handed to me just at noon or before noon a considerable number of requested instructions, and I haven't yet had an opportunity to go into them on account of reviewing this other matter at noon. I might suggest that we do this—excuse the jury until 3:15. Mr. Faulkner?

Mr. Faulkner: If the Court please, I have a motion which I filed this morning and gave to your secretary, and I would like to be heard on it at this time. And then was it the purpose of the Court to have the instructions ready by 3:15?

The Court: That is what I was just about to say, that I would try to do so.

Mr. Faulkner: What is that?

The Court: That is what I was just about to say, is that I would try to do so.

Mr. Faulkner: I was going to say, I would like to be heard perhaps on some of those that I submitted, and I thought if we could—I don't know what Your Honor's—

The Court: I do not think it is a good practice for the Court to engage in a hearing on the matter of instructions. I have never seen it done. I assure counsel that we have gone into all these matters—I have—at [566] considerable labor night after

night, and I see no reason why we need to go into argument on the instructions. To me it is wholly out of order. If the instructions are erroneous, they may be corrected.

Mr. Faulkner: I didn't mean argument, Your Honor. What I meant was to try to find out as much as we can what the Court is going to give and what the Court is not going to give.

The Court: Well, I was just about to say, counsel, this, that I am trying to work out a schedule here. The jury may be excused until 3:15 at which time we should be ready to hear the arguments of counsel and following that the instructions of the Court. If counsel will return at 3:00 o'clock, I am quite certain I will be able to rule upon the requested instructions—if that is what you had in mind.

Mr. Faulkner: Yes.

The Court: So, that, of course, we should do out of the presence of the jury. However, first, if you wish, before we adjourn—and then perhaps we better extend that another ten minutes; perhaps I better say 3:30 instead of 3:15—we will hear from you, Mr. Faulkner, on your motion. Do you wish to state your motion at this time, and then we will argue it out of the presence of the jury?

Mr. Faulkner: Well, I wouldn't think that I should state it in the presence of the jury, Your Honor.

The Court: Well, the practice has been both ways. [567] My own judgment is that it is quite proper to state your motion in the presence of the

jury but argue it out of the presence of the jury because it may involve a discussion of the facts.

Mr. Faulkner: All right. I will do that.

The Court: Well, if you can, just state your motion very briefly.

Mr. Faulkner: Well, the motion is to instruct the jury to find a verdict for the defendant. And then, if the Court please, I would like to elaborate upon that a little, and that should be done outside of the presence of the jury.

The Court: Well, then the jury may be excused until 3:30. It will not be necessary to remain around here unless you wish, and, as soon as the jury has retired, we will hear counsel upon this motion.

(Whereupon, the jury retired from the courtroom.)

Mr. Kay: Your Honor, am I correct or incorrect, that, if both parties join in a request for a directed verdict, in other words, they move for a directed verdict on behalf of the defendant and we move for a directed verdict on behalf of the plaintiffs, doesn't that have the effect, that is, one effect—I don't know whether it still does under the Federal Rules—of taking the case from the jury?

The Court: I do not know really.

Mr. Kay: I believe it does have the effect of taking the case from the jury, Your Honor. If it does, we [568] will then make such motion (departing toward the Court Library).

The Court: Can you put your finger on the rule with regard to—well, there is no such thing any

more as a directed verdict under the rules, but, that is, in a civil action the rule is with regard to a judgment on behalf of either party. I wonder if they are not thinking of criminal procedure.

Mr. Faulkner: I think so, Your Honor. I put my rules out here (departing toward the Court Library).

Mr. Nesbett: As far as I have ever been able to learn, there is no arrangement for directed verdict in a civil case. It is all directed judgments (departing toward the Court Library).

The Court: Well, suppose we recess a few minutes until we look into this. I am not even aware that there is any rule for such a motion in a civil case.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom; whereupon the trial proceeded as follows:)

The Court: Before proceeding expressly for a motion for directed verdict under Rule 50 of the Rules of Civil Procedure, I think what I had in mind was the Rules of Criminal Procedure rather than the Civil Procedure, and it also does appear, if both parties join in such a verdict by motion, that such is not a waiver of trial by jury. [569]

First, however, it is now determined that the better procedure here would be to try and determine the ruling of the Court upon your requested instructions later this afternoon, then excuse the jury to

report tomorrow morning at which time the arguments of counsel may be made and the Court will then instruct the jury rather than having to send the jury out at a late hour this evening when everybody is exhausted, including probably the jury, so that we will do that. I have already asked the bailiff if he will notify the jurors who may still be in the building, and, those who return at 3:30, we can inform them at that time. So, we will then hear first from the counsel for the defendant on the motion for directed verdict.

Mr. Faulkner: The motion, Your Honor, is for a directed verdict for the defendant in each of the consolidated cases.

(Whereupon, reporting of the arguments on the motion was waived by respective counsel and the Court.)

Mr. Kay: We did not make any motion; we suggested we might; if we did, we withdraw it.

(Whereupon, the Court reporter was excused from the courtroom, and was thereafter recalled to the courtroom; whereupon, the following proceedings were had:)

The Court: On the motion of defendant for directed verdict and having heard the arguments of counsel for the defendant, it will not be necessary to hear from counsel for [570] the plaintiffs on the matter for the reason that the Court is convinced that there are issues of fact here which must be



submitted to the jury and that the motion for such directed verdict will not lie.

Now, taking up the points raised in the arguments submitted by the written brief as well as orally; first, as to the reference to the article which appeared on the left-hand column of the paper and the subheadline "Reeve Raps Graft, Corruption," it is conceded that the subheadline made no direct reference to any one of the plaintiffs; but the question of whether by innuendo, or, rather, by imputation, not innuendo, the arrangement of that headline with respect to the check which appears immediately underneath it may be construed as leading the ordinary person reading it to a belief that the graft and corruption may relate to the check is a question for the jury. Aside from which, it is not the only charge of libel that is here. It is only one of several complaints against the publication; therefore, I find no merit to that contention.

As to the second point, it is argued that the handling of the ferry funds, public monies, were a violation of the laws of Alaska, that is, Sections 12-2-1, 12-3-1, and the other I do not have here, which is amended by Chapter 133 of the laws of 1951—I think it is 12-2-3, if I remember correctly; no; there is also a reference to 11—well, at any [571] rate the laws of Alaska with reference to the receipt and disposition of public funds, being a section of the Code as amended by Chapter 133 of the laws of 1951, if that be applicable, that is, that the handling of such funds in violation of these sections would be a violation of the law and, therefore, it

could not be a libel for the defendant to make a statement that plaintiffs had violated the laws of Alaska in the receipt and disbursement of public monies—with that, why, the Court agrees—and the publication here simply charged the plaintiffs with violating the law with relation to the manner of receipt and disbursement of public funds, and, if that be shown to be true, it would not be libelous; but counsel overlooks which to the Court appears to be a very important distinction, and that is the violation of any of these statutes is not a crime and cannot be made criminal, cannot be the subject of a criminal prosecution.

We find that clearly the article published imputes to the plaintiffs the commission of a crime. It compares them with Oscar Olson, and the Oscar Olson case, who is serving a term in the penitentiary for the commission of a crime. It suggests that the matter has been referred to the United States Attorney for criminal prosecution. All of those things clearly impute the commission of a crime, and the jury will be so instructed, and it is, therefore, libelous per se; but we are unable to find whether the violation of any of these statutes is in fact a crime; as a matter of [572] fact, the contrary appears.

Section 12-3-3 of the Compiled Laws provides expressly that if any officer or employee shall—any officer or employee approving or certifying a voucher—and I think the same thing would be true of failing to approve or certify a voucher—shall be held accountable for and required to make good to the Territory any illegal, improper, or incorrect

payment resulting from any false, inaccurate, or misleading certificate or for any payment prohibited by law or which did not represent a legal obligation of the Territory.

For violation of that law then these officials constituting the Board could have been held to account for any monies which were not eventually turned over to the Territory which belonged to the Territory. It is also certainly a rule of law that any interested taxpayer, in this case, say, anyone who pays taxes under the motor vehicle fund, could bring an action against the Board and members of the Board to enjoin them from putting the monies into a separate account or an action in the nature of mandamus to compel them to put the monies into the general fund or the motor vehicle fund. Those are the remedies provided for violation of these statutes, but they are not a crime, and in no sense can such acts be considered criminal. The difficulty is here that the article in the Empire directly imputes to them the commission of a crime. Therefore, publication cannot be [573] justified under the provisions of these statutes.

Now, coming then to the third point, that the comments in the article containing the facts of the ferry fund and in the editorial which contained a reference to Oscar Olson are justifiable as fair comment for the reason that the manner of handling the ferry funds, being a violation of the law, made the plaintiffs subject to the provisions of the same law under which Oscar Olson was convicted and sentenced to prison, we find no merit whatever in that

contention. We find that strictly and absolutely as a matter of law there can be no comparison in the legal construction of this statute for Section 65-5-63, to which the witness Daum said his attention was directed by Auditor Moore, defines the crime of embezzlement of public money. In order to constitute that crime either one of three things must be shown; either that the person accused must be shown to have converted money to his own use, and that means stealing the money; or it must be shown that he illegally loaned the money; or that he failed to account for such money on demand.

Mr. Faulkner: Or as directed by law.

The Court: Or as directed by law; pardon me; not on demand, but as directed by law. Now, there is no evidence of any of those things here. It is admitted that there is no claim that the plaintiffs ever actually converted any of these monies of the ferry fund to their own use. It is admitted [574] that any such imputation, if intended by the article, is untrue. There is no evidence of their failing to account for any money, no evidence whatever, neither through the audit which was offered here or any other means.

The only other possibility of such statute being applicable to the violations here alleged, which is the theory of the counsel for the defendant, is that the placing of this money in a separate bank account constitutes a loan to the bank. I have carefully considered that question. I find that, if monies are deposited in a bank in an account under which the bank pays interest to the depositor, a savings ac-

count or certificate of deposit, that there is a loan to the bank, but otherwise, if money is deposited in the bank subject to check, the authorities are very definite in holding that such does not constitute a loan. It is true that the relation of debtor and creditor exists to the bank, and it can be called upon as a creditor to pay the money to the depositor, but that does not constitute a loan. The Court definitely finds that depositing of the monies in this ferry account does not constitute a loan, and, even if that were so, it would be very farfetched to suggest under this publication that the comparison to the Oscar Olson case was because these parties had loaned the money, so there is certainly at least a grave question for the jury to determine whether there was an imputation that they had embezzled or stolen the money in the ordinary sense in which [575] the term is generally used and known to the public, and that is important here. Therefore, we can find no parallel in the provisions of 65-5-63 or in the provisions of the other statute under which Olson was actually convicted, which is to the same effect except that it relates to the duties of the Treasurer.

Now, with regard to fair comment, we are entirely in accord with counsel for the defendant that, if under the evidence there is no sufficient showing of any language in the published, or, in the case of slander, of the spoken, words which are susceptible of being defamatory, then it would be the duty of the Court to grant the motion. It has the same effect as a motion for a judgment of acquittal

in a criminal action; that is, the Court may find that there is no evidence to go to the jury sufficient to constitute the crime and, therefore, take the case away from the jury; but we certainly cannot so find here. There is ample evidence in the opinion of the Court to go to the jury on the question, if not a question, of whether there was or was not language in the publication complained of which was defamatory or capable of a defamatory meaning. It is also confessed that the rule of law that in judging the article all of the article must be considered and read, and, possibly, if there was only one word which was interspersed somewhere in it, which may be considered to be defamatory, that could be disregarded, but by reading it in [576] the entirety we think, just what it says, we mean that all of it may be considered, and it is no more logical to suggest that we should exclude those portions which may be defamatory than it is to say that we should exclude those which are not, and, definitely, some of the reported articles about reported facts may not be considered defamatory, but, if we consider it all, we are entitled to consider those portions of it which may be held to be defamatory.

In the same manner as to privilege, we have no quarrel with the defense of counsel that there is here a qualified privilege, except this, that I think it is also the law that there is no qualified privilege as to charges of fraud or corruption unless it be shown that there is no malice. All of these are questions for the jury.

We will not submit to the jury, as has been re-

quested by counsel for plaintiffs in one of their instructions, that there is only an issue of damage. I feel that there are certain other issues with regard to the allegations of truth and that despite the fact that such allegations are not justified under the provisions of the statute cited and that particularly by reason of the claim that there was a justifiable comparison or parallel with the Oscar Olson case on account of the use of the special fund. I think that raises a question for the jury to determine.

But, certainly, the matter will be submitted to the [577] jury with full instructions on the question of privilege and full instructions on the question of justification as to the truth of the publication constituting the defense, because we are obliged to instruct and will instruct the jury that no such justification can be placed upon the construction, contended for by the defendant, of these statutes, because that is a matter of law and not a matter of fact.

Mr. Faulkner: Is the Court finished?

The Court: Yes.

Mr. Faulkner: If the Court please, I would like a little further enlightenment on just what the defendant may argue. As I understand—I don't want to get into argument and have the Court disagree with me and interrupt me and stop me, and I will try to confine my argument to the Court's rulings on the law as we have gone along, but, then, do I understand that we can argue that we contend these facts were true, that there was a setting up of this

special ferry fund, the placing of these monies in the custody or under the control of a man who was not an official and had no bond, and then our contention with reference to what was meant by the parallel to the Olson case.

The Court: Oh, yes; that issue will be fully submitted. That, I think, is the principal question for the jury to decide here—what is meant in the ordinary sense by this publication; whether what was meant was to charge the [578] plaintiffs with embezzlement in the ordinary sense, or whether what was meant was merely to charge them with the violation of their duties with respect to the handling of these funds illegally, or whether such was done illegally. I think that is a question for the jury.

Mr. Faulkner: Yes.

The Court: But my point is that we cannot—the jury will be instructed definitely that such acts are not criminal unless they come within the definition of the statute with regard to embezzlement regarding the conversion of public money to their own use.

Mr. Faulkner: Well, of course, we didn't charge that.

Mr. Nesbett: It is not charged.

The Court: I say, that is the only way in which there could be a justification under the statute, because that is what the statute says—if there is a conversion to their own use. It doesn't say—for illegally depositing and paying out money without the approval of the Auditor.

Well, again, we will try and—we will try and announce the ruling on the requested instructions at



4:00 o'clock. We will recess until that time. Did I say, finally, that the motion of the defendant for directed verdict will be denied.

(Whereupon, Court recessed until 4:00 o'clock p.m., reconvening as per recess, with all parties present as heretofore and in the absence of the jury from the courtroom: [579] whereupon, the trial proceeded as follows:)

The Court: We will now take up the matter of the proposed instructions, which the Court will endeavor to rule upon. They are voluminous. It is difficult to cover every precise point, but we will endeavor to do so.

Taking up, first, the Plaintiffs' Proposed Instructions and turning first to No. 1, this instruction is granted in substance. It has been partially covered, and I think, possibly, some little addition should be made to the instruction prepared touching upon the responsibility of a corporation for the acts of its servants or agents, so that I will modify it some to avoid any possible comment upon the evidence.

No. 2, the proposed instruction with regard to retraction has been covered as to the matter of it being considered not only as a retraction, which the Court finds must be done simultaneously and not afterwards, but also in the matter of the mitigation of damages. However, I will not instruct the jury that the editorial named "Attention," either as a retraction or explanation, should not be considered by the jury for any purpose. That portion of the requested instruction is denied.

Plaintiffs' No. 3, this request is covered with respect to the imputation to the plaintiffs of the commission of a crime and that such is libelous in itself and the presumptions of law arising therefrom. However, the jury will also [580] be instructed that presumptions of this character, like all presumptions, may be rebutted, that is, presumptions of malice and injury. The defendant may rebut such presumptions by competent evidence upon which the burden rests upon the defendant. As to the third paragraph of the Requested Instruction No. 3, I do not propose to instruct the jury that the acts compared the, or, that the publication compared the acts of the plaintiffs with those of an admitted embezzler. I will instruct the jury that they impute the commission of a crime. I am not going to determine as a matter of law that the imputation was the crime of embezzlement on account of the grave conflict of the evidence here as to what was intended and as to what may reasonably be imputed. I firmly believe that that is a question for the jury and not for the Court to determine. There is here a serious conflict in the evidence upon that point, as to what may reasonably be intended. The Court will not invade the province of the jury by determining that particular point. The jury will be instructed that it is the exclusive province of the Court to determine whether the matter is libelous per se or not. They will be instructed that the publication here is libelous per se in that it imputes the commission of a crime, but I am not going to say that it imputes

the commission of the crime of embezzlement. That is for the jury.

Plaintiffs' Instruction No. 4 with regard to malice [581] and the distinction between legal malice and actual malice is covered by other instructions substantially as set forth here.

Plaintiffs' Proposed Instruction No. 5, in which the Court is requested to instruct the jury that the only question for their decision is the extent of damages, is refused for the reasons already recited. I debated this question at very considerable length, particularly under the pleadings. It did appear from the pleadings that would be the only issue, but, as we got into the trial, I find that there are other issues to be submitted to the jury, and, therefore, cannot grant such request.

No. 6, that is very questionable. I think it confuses the matter of justification of the question of malice and confuses it so that I cannot tell what it means. For that reason the instruction is refused, but it is covered, so far as the law is applicable, by other instruction.

No. 7, I have at the bottom here, I think. Oh, I beg your pardon. It was No. 12. I thought we had two sevens. I believe that that is at the bottom, but it is No. 7. No. 7 is covered substantially by the instructions as prepared except, again—there is no exception; it is covered substantially by the instruction prepared. Referring to the second page of No. 7, the first paragraph is covered, and the second paragraph is likewise covered, and in this particular respect I find a conflict between the instructions

prepared by the parties. Plaintiffs [582] propose that the jury should be instructed that they are not obliged to allow the plaintiffs any sum by way of exemplary or punitive damages, the fact that they are entirely separate; that is what I find to be the law. The defendant's instruction, which we will come to after this, is contrary to that. And, particularly, that portion of the instruction is covered with regard to exemplary damages, if it is a matter of honest belief—well, not only exemplary damage, but the matter of actual malice—without malice involved—actual malice as it may relate to either compensatory or punitive damage is covered by the instructions prepared.

No. 8, this instruction has been fully covered by the instructions prepared, except I had not used the word "qualified." I am not certain whether the jury might know what that means. I used the words instead that there was a measure of privilege. Perhaps it may be more accurate to use the term "qualified," and I will try and do so.

No. 9 is, I think, a correct statement of the law and is granted except as to the last paragraph. I do not know how we can expect the jury to determine as to whether the defendant has proved that plaintiffs committed all the elements of the crime, both in act and intent. I find that there were previously decisions on this subject as harsh as stating that they must prove the allegations of the crime to the same extent as is done on indictment or information. I [583] find that that rule has been modified. We do not need to go that far. That in sub-

stance would be requiring the jury to try the guilt or innocence of the plaintiffs. The rule as to justification does not go quite that far. Therefore, the instruction will be modified accordingly.

No. 10 had not been covered but is granted in substance, though slightly modified, again with the view of avoiding any direct comment upon the evidence, which the Court is not permitted to do.

No. 11, upon which there is considerable disagreement amongst counsel, I, as previously stated, feel that this instruction is proper and that we have not for consideration here before this jury any issue as to whether a shortage occurred in the Chilkoot funds as handled by the purser, Coughlin. There is no allegation, no reference, to such in the published articles or editorially upon which the suit is based. There is no evidence whatever in the testimony of Mr. Daum that he knew of any such shortages at the time he wrote and published the article. He testified only that the witness Larsson (Steve Larsson Homer) told him that there was going to be something break about this account. There is no indication whatever from his testimony that he knew of any such shortages. The audit was prepared months afterwards. It is alleged there was no such shortage. But, actually, I did not find that it did. In any event, it had no place in this suit with regard [584] to the truth or falsity of the publication. Therefore, that instruction will be granted.

Now, turning to Defendant's Requested Instructions, No. 1, which, largely, defines the issues, is covered by other instructions.

No. 2 is—no—there is one reference here to a false and unprivileged publication, which the Court particularly notes in the definition of the law of libel, which will be added, although the question of privilege had been fully covered by other instructions. We will add that phrase.

No. 3, with reference to the matter of privilege, is fully covered by the instructions, I think, substantially as set forth in this request, well, except for omission of the words “although defamatory.”

Mr. Faulkner: What is that, Your Honor?

The Court: Omission of the words “although defamatory.” Actually, I cannot find that a criticism, which is actually defamatory, is privileged. It is privileged if it is not defamatory.

Mr. Faulkner: Is that the quotation from the “Restatement”?

The Court: The quotation says that “matters of public concern is privileged if the criticism, although defamatory.”

Mr. Faulkner: Well, didn't I correctly quote there, [585] Your Honor?

The Court: Well, I cannot believe that that is the law, even though the “Restatement of the Law of Torts” may so indicate. It may be qualified by what follows, that is, if it is under “a true or privileged statement of fact” or “represents the actual opinion of the critic” and “is not made solely for the purpose of causing harm to the other.” Now, I find that the question of privilege does not go quite that far, but the instructions will be granted insofar as I can find that the law is applicable.

No. 4 is covered by the instruction except that on Page 2 of this instruction the word malice used here as meaning actual evil-mindedness should be and is corrected in the instructions given to refer to actual malice and not legal malice, and I have endeavored to draw the distinction between those two things, which is a very confusing matter to anyone, particularly to jurors, and I have endeavored to make that distinction as clearly as I possibly can do so. At least, the jury will be instructed that there is no presumption of the existence of actual malice, which must be proved, but that there is a presumption of legal malice where a matter is libelous per se.

Instruction No. 5 is denied for the reasons already assigned in ruling upon the defendant's motion for dismissal; that is, the question of the inference as to this subheadline [586] is one for the jury, and not for the Court to decide as a matter of law.

In Instruction No. 6 the reference to the statutes here involved, that is, Chapter 133 of the laws of 1951, is covered by instructions, although I did not find it necessary to quote the statutes in full, which I think would only confuse the jury, and to that effect, to that extent, the instructions cover it. However, the request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. That, again, is not for the Court to determine. There is dispute on the evidence. The defendant says they were. The plaintiffs, particularly Mr. Roden, say it was not. I am not going to decide that

question. I leave it to the jury to decide. As to the last paragraph of No. 6, again with reference to the discrepancies of the ferry fund, that is denied because it is not relevant to the issues of the case. Oh, yes; there is a No. 6 alternate. No. 6 alternate is likewise covered with reference to calling attention of the jury to the sections of the Compiled Laws here set forth, which I think should justly be called to their attention in deciding these issues, although, again, I have not seen fit to quote them in full. The remainder of the last paragraph of the alternate instruction, indicating that it is undisputed that the accounts found discrepancies in the ferry fund, is denied, first, because [587] there was certainly a dispute on that fact, and, second, because we have found that it is irrelevant.

Instruction No. 7 is denied, because I cannot find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated in the ruling upon defendant's motion, the deposit of monies in the bank account does not constitute a loan in violation of that statute. The Court will instruct the jury instead that, as far as the statutes concern embezzlement, that there is no parallel of fact in this publication. We will instruct the jury that, as to any issue of the device claimed by Mr. Moore and other witnesses, that that is presented, although it is very difficult to prepare an instruction which will not be inconsistent upon that point. I will certainly try.



Instruction No. 8, in regard to the parallel of the Oscar Olson case, must be denied. The matter of fair comment and criticism covered by this instruction is covered by other instruction, but I do not think the test is whether the editor, who in good faith considered the matter to be fair comment and privileged, or whether the words in the sense in which they were used, in the ordinary meaning which they were given, are fair comment and privileged, and the jury will be so instructed. [588]

No. 9 is covered by other instructions except as to the explanation published. Instructions prepared are to the effect that such do not constitute a retraction unless the truth of the statement published was admitted, which I think is definitely the law. Merely to publish the explanation of the plaintiffs without stating that these explanations were true is not a retraction.

Mr. Faulkner: May I say a word, Your Honor?

The Court: Yes.

Mr. Faulkner: That was never intended, that the retraction in effect would imply that the published material was wrong or that they were taking it back or retracting it. That is not a retraction but an explanation.

The Court: Oh, I am referring now not to this publication of the next day. That is what I understood this Instruction No. 9 relates—oh—

Mr. Faulkner: No. I think it does relate—

The Court: Oh, I am speaking now of the second paragraph—“that defendant opened its columns to plaintiffs on the same day.”

Mr. Faulkner: Isn't that in No. 8?

The Court: I am, I thought, reading from No. 9.

Mr. Faulkner: Pardon me; oh, yes; the second paragraph. Excuse me, Your Honor.

The Court: Yes; that is what I am referring to. It [589] is that such does not constitute a retraction, if that is what is intended, unless the truth of those statements are admitted. The first paragraph of No. 9 is, as previously stated, covered by other instruction.

Mr. Faulkner: That covered the explanation.

The Court: Yes; that is the next day; the first paragraph.

Mr. Faulkner: Do I understand the Court will give that or not, that first paragraph?

The Court: Oh, yes; the jury will be instructed that they should take this statement into consideration, especially in the matter of damages.

Mr. Faulkner: And, in the other matter, it is controverted and it is a matter for the jury, the second paragraph, as I understand it.

The Court: Well, no. The point is that the second paragraph, Mr. Faulkner, that this explanation published in the columns of the paper on the same day would not be a retraction——

Mr. Faulkner: Oh, no.

The Court: ——unless the truth of those things were admitted. Naturally, the jury may take it into consideration.

Mr. Faulkner: Yes.

The Court: Yes.

Mr. Faulkner: But what I meant, Your Honor, was [590] that there was a conflict of evidence, which I did not contemplate at the time I drew this, as to whether these statements were made by two of the plaintiffs on that day. That would be a question for the jury if they want to deny that they made them. That would be a question for the jury, wouldn't it?

The Court: Well, yes.

Mr. Faulkner: Yes. So, may I say this? In fairness to Mr. Roden, he said that he did not; Mr. Metcalf, I think, said he did; but Mr. Roden said he didn't. So, there is a question there for the jury.

Mr. Kay: Mr. Metcalf merely said he was interviewed, but he didn't admit the correctness of the——

Mr. Faulkner: That is right; he didn't.

The Court: Well, we will check that a little further to see if we have it substantially covered.

Mr. Faulkner: I think that would be a question for the jury.

The Court: No. 10—I think we have already covered that with regard to the check. I do not propose to comment at all upon this matter of the check, except to instruct the jury that they can consider the headlines as well as the articles and any imputations arising therefrom. I do not think I should comment particularly on that item. It isn't the province of the Court.

Mr. Faulkner: Your Honor, I think I am off the track [591] here. What is that one?

The Court: No. 10, with regard to the check being placed in a prominent place on the front page.

Mr. Faulkner: Do we have that in there?

The Court: Wait a minute.

Mr. Faulkner: My No. 10 is different.

The Court: I have my notes wrong here; oh, beg pardon; I had my notes wrong; I mean, I was looking at the wrong notes. I meant merely that I was to check that a little further. I think that that instruction is substantially covered, and I meant by my note here to check it a little further; if not, it will be covered.

No. 11 I find also is substantially covered; and, especially the next to the last paragraph on Page 2, I think that is the law with reference to the right of an individual being the same as a corporation or the same as a newspaper. I find no difference.

No. 12, with regard to fair comment and the question of privilege, is granted in substance.

No. 13, the matter of the facts set forth in the publication, had not been fully covered, but it will be covered, although the language of the first paragraph here I think must be denied, but it will be covered so far as I find the law to be applicable. The second paragraph is substantially granted, or granted in substance; and, likewise, the next [592] paragraph, except this language: "The fact that the criticism may be fantastic is immaterial, and the extravagant form of its expression is unimportant." That portion is denied.

Mr. Nesbett: "And the extravagant"——

The Court: "And the extravagant form of its expression is unimportant." I do not think that is the law. And, as to the last paragraph on this page, No. 13, that is denied, because I do not find the rule here applicable, that is, where there is an attempt to wrench a word or a phrase out of an article and call it libelous. I do not find that applicable here.

Instruction No. 14, the matter of the definition of a crime is, I think, sufficiently covered. The matter of the definition of the crime of embezzlement of public money is fully covered, and I propose that the jury should be entitled to the language of this section in full in order that they may fully understand that issue. I cannot find that the last paragraph there is a correct statement of the—well, not a correct statement of the law, but is appropriate or justified, and that last paragraph then must be refused.

No. 15 is covered by other instructions as to what comments are fair comments and the matter of privilege and also covered with regard to the issues in the complaint and answer as to damages, likewise as to punitive damages and as to malice. Here is a question here that I would like to be [593] considered right at this time. Perhaps—I do not find it here—perhaps it is in a later one, Mr. Faulkner, where you referred to the fact that the plaintiffs Roden and Metcalf do not claim punitive damages. That is corrected by amendment.

Mr. Faulkner: That can be taken out, Your Honor, because I wrote that before the amendment was made.

The Court: I thought it was in here, in your Requested Instruction No. 15, but at the moment I do not find it.

Mr. Faulkner: No. I think that was later.

The Court: Later, I think; yes. We will take it up when we come to it then. As to the matter of the granting of exemplary or punitive damages only where there is evidence of actual malice or a reckless disregard of plaintiffs' rights, that is granted and is covered by instruction.

No. 16, the first paragraph is covered by standard instruction. The next paragraph is denied with respect to legal malice by reason of the presumption arising from an imputation of crime. It is granted as to actual malice. That portion of the requested instruction, the last two paragraphs, with relation to the defendant, that there is no allegation in the complaint that the defendant did not believe these statements were true and that the law presumes, raises a presumption of good faith, I do not think that that is the law, particularly where there is a presumption of malice, and that portion is denied. [594]

No. 17 is a standard instruction and is given—rather, the first paragraph. The second paragraph, I think, is sufficiently covered.

No. 18, the first two paragraphs are covered by standard instructions. The third is denied for the reasons previously assigned. As to the remainder, with regard to production of records, I cannot see that such an instruction is justified, where the evidence here showed without controversy, as far as

I could hear it, that an effort had been made to produce the records. The defendant itself produced all manner of certificates showing that search had been made and they could not be found. Then, how can we tell the jury that there is some grave fault in these officials for not producing the checks; and I will not so instruct the jury.

No. 19 is covered by standard instruction.

No. 20 may be proper, but I find it is wholly unnecessary. I don't think there is any such issue, and, therefore, it is not relevant. I don't think it is necessary to instruct the jury that expediency and convenience are no excuse for violation of the law. I see no reason for such instruction.

No. 21, which explains the statutes under which Oscar Olson was convicted and sentenced, is substantially covered by another instruction, which I think should be explained to the jury.

No. 22 is covered, I think almost exactly as set [595] forth here by Judge Yankwich, or at least in substance.

No. 23, and again on the matter of fair comment, is substantially covered by the instructions, except for the last paragraph which is refused.

No. 24 is denied for the reason that I do not believe that it is established as a matter of law that, if the statements of fact are true, that we can disregard the comment, because the comment is just as much a part of the publication as the statement of fact, so I cannot instruct the jury that, if the facts are substantially true, the right of fair comment is a complete defense as to any comment, and that

instruction will be refused. That is covered with regard to what is fair comment and what is not by the instructions prepared.

No. 25, with respect to the violation of the provisions of Chapter 133 of the Session Laws of 1951, is covered, so far as I find need be done, by the instructions prepared, except as to the last sentence, in which the Court is asked to instruct the jury that the setting up of the fund in the Behrends Bank and payments therefrom were in violation of the laws of Alaska, which is refused. That, again, is a question for the jury.

No. 26 is denied for the reasons already assigned, because we cannot say that comment in an editorial is privileged because it is only the writer's opinion. That is not privileged and is denied. [596]

No. 27 is denied for the reasons previously assigned. I cannot understand the quotation here from the Restatement of the Law of Agency that a person—"If an agent is appointed to perform an illegal act, and he does so, the one appointing him is responsible criminally." I think that is a rather broad statement. He would not be responsible criminally unless he were an accessory in some manner; then of course he would be responsible. But I do not find such requested instruction to be applicable here, and it is denied.

No. 28, with regard to the authority to operate the ferry at all or purchase it, is denied for the reasons already stated by the Court, except this, that the last portion, that the law is applicable—"all laws applicable to the receipt and disbursement



of public funds” may be applied to the ferry fund—that is of course obvious, and I think it is substantially covered—well, not obvious—there is no other means—no—I did not read this too carefully. The last sentence—“Notwithstanding the fact that there was no authority in law to purchase the ferry,” which we have already ruled upon, “having used Territorial funds for that purpose and having used Territorial funds in the operation of the ferry, all laws applicable to the receipt and disbursement of public funds should have been applied in the handling of these monies.” Again, that is a matter of very considerable dispute here and a difference of opinion between even the Attorney General and the Assistant [597] Attorney General, and I am not going to so instruct the jury. One Attorney General seemed to think it was all right, and one of the Assistants seemed to think it was not, and one former Attorney General thought it was. I am not going to instruct the jury as to whether it was or was not applicable.

No. 29 is denied because it is not applicable, although it is a correct statement of law.

No. 30, with regard to specific questions to be answered, I have been debating that question. I would like to consider it further. Generally, in cases of this kind I think the Court should try to avoid this type of verdict if it can. I would like to hear from counsel for the plaintiffs as to their views as to the special forms of verdict.

And, also, I still didn’t find the reference, somewhere, to the matter of punitive damages with ref-

erence to plaintiffs Roden and Metcalf. I would like counsel for the plaintiffs to state to the Court whether or not it would not be proper for the Court to instruct the jury that no question of punitive damages should be considered as to these two plaintiffs on the matter of actual malice. Has there been actual malice shown as against Roden and Metcalf?

Mr. Kay: I believe so, Your Honor. In that regard, from this point of view, of course actual malice is something that is hard to produce direct proof on. However, we have shown, I believe, rather conclusively by the many extensive [598] exhibits that the animosity, or at least we hope that we have proved—we offered evidence that the animosity against the Governor extended to those who co-operated and worked with him and were members of his administration. And on the question of actual malice——

The Court: They were not specifically named. There was some talk about a Gruening machine, and then I think Mr. Small particularly denied that there was any such thing.

Mr. Kay: They have been named specifically of course in these series of articles, and then they follow up, which is introduced in evidence, refers to them——

The Court: Well, I did not have an opportunity to read all of these exhibits other than what you read to the jury.

Mr. Kay: All that I was going to point out in that regard was that after this publication and a

few days later an editorial was published, which is in evidence: "Attempts to silence Alaska's free press through intimidation took a new turn last week as Ernest Gruening and two administrative satellites brought civil suits against the Daily Alaska Empire in the sum of \$300,000." And then it went on: "the Empire's publisher herewith informs Dr. Gruening that she is not and will not be frightened by his political antics nor those of his cohorts."

Now, I feel that there is sufficient evidence of [599] actual malice to justify the imposition of punitive damages if the jury is to believe that this vindictive feeling, if such existed, against the Governor extended to those in his administration closely co-operating with him. But in any event, Your Honor, may I point out that, as Your Honor has said, that this is a libel per se. Malice is, therefore, presumed, and——

The Court: That is legal malice.

Mr. Kay: The legal malice——

The Court: I am speaking of punitive damages.

Mr. Kay: ——in a libel per se——

The Court: Therefore, to assess punitive damages, surely, there must be an actual malice.

Mr. Kay: I believe not, sir; I think not according to the law. If there is a libel per se, particularly in the case of criminality, I think that that libel is sufficient to support a——

The Court: Well, let me correct that please. Either that there must be actual malice or that the act was done wantonly and recklessly, without regard to the right of plaintiffs. So that in that re-

spect there is an issue as to whether there was a wanton or reckless act without regard to the right of those plaintiffs, and, correcting myself then, with that view I believe that the issue should be submitted to the jury.

Mr. Kay: I believe so, Your Honor. [600]

Mr. Faulkner: Your Honor please, in that connection, in writing these proposed instructions of the defendant's I attached to them, as the Court has noted and stated, a special form of verdict, that is, certain specific questions to be answered. In doing that I have followed the procedure in the Golden North case. It is very difficult, I imagine, for a jury to decide a libel suit without doing that.

Now, in preparing this special verdict, you may notice in these instructions I have proposed there and gave you, I have given you only one set of verdicts. I have given you only one for Governor Gruening, and the reason I didn't give the other two was that I had them written out but, since they added the malice allegation in the complaint, I had to rewrite them and add or make them exactly the same as the other, and I will have those here in the morning. They are done, and I just forgot to bring them up at noon. I did them last night. So, your file, in other words, is not complete until I bring those other two sets for the Court to rule on. That will be done.

The Court: I would like to hear from counsel for plaintiffs; what is your suggestion with regard to these special forms of verdict?

Mr. Nesbett: Your Honor, we haven't studied them.

The Court: I don't mean special forms. I mean specific questions. [601]

Mr. Nesbett: First of all, we object to asking for special findings because it does nothing but confuse the jury. There is nothing unusual about this case that would make it different from any other libel or slander case where the only matters to instruct upon must be determined and then the question is, if such and such a determination is made, whether they are entitled to damages and how much. There is room for two findings, compensatory and punitive damage, and I can't see anything that separates this libel suit from the ordinary run of the mill libel suit in connection with the instructions or the form of the verdict.

Now, I can see where putting six questions to the jury with parentheses, for example, under No. 1: "(If you have answered 'Yes' to question No. 1, then you should not answer any of the remaining questions; but if you have answered 'No,' then answer Question No. 2.)"—and then it goes on down and gets so involved that you are running the sheets back and forth, and, as I say, Your Honor, it does nothing but confuse, and it would result, if this were anything in the way of a peculiar type damage suit, or, rather, libel suit, then the matter of damages might become more involved, but it is not, and it should be kept simplified just as we attempt to keep the instructions as simplified as possible. Those are our opinions on the matter.

Mr. Kay: I would just like to add—I can see why [602] and how in, perhaps, a case where it is not libel per se and there was innuendo, it would be considerably to the plaintiff's advantage in such a case, and I wouldn't blame him for asking for it, to ask a number of questions in the hope that the jury might come up with a conflict between the answers and, therefore, vitiate their findings and require a new trial, and I think that that possibility would always exist here because it is going to take a lot of study on the jury's part to go back and forth all the way through these questions, whereas, basically, the question in this case is rather simple—were these plaintiffs libeled, as instructed by the Court, and, if so, what actual damages are they entitled to, and, if they are entitled to any punitive damages, what amount of punitive damages are they entitled to? Therefore, we very strongly oppose the giving of any series of six questions in arrival of a verdict. It is a rather peculiar form of verdict in any event. I should think that, if the Court were to submit anything and propose anything but a general verdict, it might submit a series of questions in addition to a general verdict or interrogatories in addition to a general verdict; but this purports to be a form of verdict.

The Court: No doubt it is a question for the discretion of the Court: I rather hesitate to do it because I feel, too, that it would only cause confusion. I do know that the last time I attempted something similar to it the jury [603] returned with their verdict, and after they had been discharged

both parties turned to me and said, "If the Court please, who won?" And I said, "I do not know." And I didn't know. And it is a whole lot simpler, I think, to let the jury decide whether the defendant is liable and, if so, how much. I do not believe that it would be wise to give such specific questions.

Mr. Faulkner: If the Court please, in submitting this to the Court I followed the Golden North case in which they did that—only they submitted, I think, more questions—and that procedure was largely based on *Coleman v. MacLennan*, in which they submitted a dozen questions, and the Court held that to be proper, and I think those two are our leading cases on libel.

The Court: Oh, I think it would be proper, Mr. Faulkner, but I think it is a question for the discretion of the Court, whether it would be wise.

Mr. Faulkner: It is very difficult to submit a general verdict to a jury in a case of this nature, as is usually done, and I find in my examination of the authorities what is usually done in libel cases—first, whether the publication was libelous within the language of the Court's instructions, whether it was libelous *per se*, if the truth were established, whether the comment was fair, and then whether there was any malice; and that is very essential. You should [604] get a general verdict whether it is based on malice or what it is based on.

Mr. Nesbett: I think counsel is mistaken. I have seen a number of libel suits in Alaska and been involved in them and I have never seen it done, nor in slander. Furthermore, according to Mr. Faulkner's remarks that *Coleman v. MacLennan* is a lead-

ing case on libel, apparently, I don't think he is quite correct. He made the remark this morning that that case had overruled *Scott v. Times Mirror*, which I had cited. Actually, it is the reverse. *Coleman v. MacLennan* is reported in 84 *Pacific*, whereas *Scott v. Times Mirror* is 184 *Pacific*, a much later case and is a leading case, and, as I say, cited in many, many, many of the cases which deal with the points that we are concerned with here on libel.

Mr. Faulkner: I think counsel misunderstood me this morning. That isn't what I said. I said it was our Court of Appeals in a very recent case, the *Golden North Company*, referring to this *Coleman v. MacLennan* case as a leading case, and said that, while it was overruled in a certain case or two, that the Courts have gone back to it, and that is now the law. That is what the Court of Appeals said about it, not what I am saying about it.

Mr. Nesbett: That isn't what my notes say.

The Court: There is no need of prolonging this argument, I think. I do find that the law of libel is not as [605] simple as some people may think.

Mr. Kay: That is for sure.

Mr. Nesbett: Your Honor, I gave you a handwritten instruction, Proposed No. 12, regarding and concerning the articles as a whole. Did you say that was covered?

The Court: Oh, yes. I neglected to attach that here, but I will. I have it here some place.

Mr. Nesbett: Is it covered?

The Court: It is covered; yes, sir.



(Whereupon, Court was adjourned until 10:00 o'clock a.m., November 19, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; respective counsel were furnished copies of the Court's Instructions to the Jury; whereupon, Mr. Kay made the opening argument to the jury on behalf of the plaintiffs; Mr. Faulkner commenced the argument to the jury on behalf of the defendant; and thereupon, the Court recessed until 1:30 o'clock p.m., November 19, 1955, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon, Mr. Faulkner concluded the argument to the jury on behalf of the defendant; Mr. Nesbett made the closing argument to the jury on behalf of the plaintiffs; the Court read his Instructions to the Jury; and the following occurred:)

The Court: Now, if counsel for either party wish to interpose objections to the Instructions, will you please [606] approach the bench?

(Whereupon, after conference at the bench between Court and counsel, the jury retired from the courtroom; and the following occurred:)

The Court: We will hear then from the plaintiffs as to any exceptions. The Court will not entertain any argument upon these exceptions. You may state them.

Mr. Nesbett: The plaintiffs except to Instruction No. 5, Your Honor, commencing with the words "The statute" on Line 12 and continuing to Page 11, through Line 5, upon the ground that quoting the entire statute under which the Territorial Treasurer was sentenced is confusing in connection with the Instruction No. 5 as a whole and when read in connection with the other instructions. I think, for one thing, it has been fully covered.

The Court: Is that the only one?

Mr. Nesbett: That is all; yes.

The Court: As we have stated previously, the Court on ruling on the motion for judgment for the defendant, we found it necessary to quote this full statute to the jury in order that they can fully understand what constitutes embezzlement. Such quotation surely cannot be prejudicial to the plaintiffs, and I do not find it confusing. I think it is necessary, in view of the issues here, that the jury knows exactly what the crime of embezzlement is. The objection is [607] overruled, or exception denied.

Mr. Faulkner: That is all you have?

Mr. Nesbett: That is all; yes.

Mr. Faulkner: Then the defendant wishes to except to portions of Instruction No. 3, beginning with Line 9 of Page 1 of that Instruction, to and including the words "damage resulted" on Line 14 of the same page—Line 16—pardon me—no—14.

The Court: That is with reference to libel per se.

Mr. Faulkner: Line 14; that is right; Line 14; yes; that is it. And then to the last paragraph of this Instruction, Line 31, on Page 1—

Mr. Nesbett: I can't hear you, sir.

Mr. Faulkner: Line 31. The last paragraph, beginning on Line 31, Page 1 of this Instruction; that would be Page 6 of all of the Instructions. The Instructions are paged. It would be Page 6 of the entire Instructions.

Then the defendant excepts to the entire first paragraph of Instruction No. 4, ending on Line 16; the paragraph ending on Line 16 of Instruction No. 4, which is Page 8 of the Instructions.

And then the defendant excepts to that portion of Instruction 5, beginning Line 12, Page 2 of the Instruction; beginning Line 12 of Page 2, which—

The Court: That is the same one that the plaintiffs [608] objected to.

Mr. Kay: I was going to say we better withdraw our objection, Your Honor.

Mr. Faulkner: How is that?

The Court: That is the same one that the plaintiffs objected to.

Mr. Faulkner: No.

The Court: You said No. 5, beginning at Line 12, Page 2.

Mr. Faulkner: Page 2 of that Instruction.

The Court: Page 2—oh, beg pardon; my error; Line 12, Page 2.

Mr. Faulkner: Page 2 of that Instruction.

Mr. Nesbett: That is Page 11, Line 12.

Mr. Faulkner: Page 11; that is right; Line 12, the words: "Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds."

And then, again, in Instruction No. 5, beginning at Line 16, Page 2 of that Instruction and Page 11 of the whole, beginning with Line 16, at the beginning of it, down through the word "prosecution" on Line 21. And defendant objects to the whole of Instruction No. 6—no; I haven't finished with 5; excuse me, Your Honor. And to Instruction No. 5, that portion contained on Page 12, beginning at the top of the page, above Line 1, with the words "No penalty," [609] down to and including Line 15, the words "disqualification from office."

And then to the whole of Instruction No. 6.

The Court: Well, you object to the language that "No penalty is provided for violation"——

Mr. Faulkner: Yes.

The Court: Do you find any?

Mr. Faulkner: Well, no, Your Honor, but——

The Court: I certainly wasn't able to. I searched and searched and I couldn't find any.

Mr. Faulkner: No. If you want my theory, I will give it to Your Honor.

The Court: Well, I see. You don't mean any express penalty.

Mr. Faulkner: No. I don't mean any express penalty in those statutes. I meant that the penalty was over in the other statute.

The Court: Yes; I had in mind that was your theory.

Mr. Faulkner: Then to Instruction No. 6, as that would be inconsistent with the ruling of the Court rejecting Mr. Homer's testimony or sustaining objection thereto.

Then the defendant objects to Instruction No. 7 in its entirety.

And No. 8, paragraph 1, the entire paragraph 1 in Instruction No. 8 on Page 16, and paragraph 3—oh, no; pardon [610] me. I think that paragraph 3 is covered in your next paragraph there.

The Court: Do you object to all of No. 8?

Mr. Faulkner: No. The first paragraph of No. 8.

The Court: I mean, all of that paragraph?

Mr. Faulkner: All of that paragraph.

The Court: You object to the words: "The truth of the words complained of is an absolute defense to an action for libel"?

Mr. Faulkner: Well, no; I don't object to that; no, Your Honor. I am mixed up on that. That isn't it; no. From the words "To be" on Line 6 of Instruction No. 8.

The Court: I see.

Mr. Faulkner: Thank you for calling my attention to that.

Now, I think that is all, excepting I have one or two here that I think were included in my instructions. Let me go over these for a minute and see if they were included.

The Court: I think exceptions were already taken, were they not, for refusal to grant the requested instructions?

Mr. Faulkner: No; I don't think so, Your Honor. No; I don't think I did, did I?

Mr. Kay: I think it is understood. If not, I would stipulate, as to both sides.

The Court: Without enumerating them, those exceptions [611] are certainly allowed, for refusal to——

Mr. Faulkner: Well, I have only a few here, Your Honor, and I think that——

The Court: I really don't think it necessary to enumerate them. They are all in the record. As a matter of fact, I have made notes on each one. Exception to the refusal of the Court to grant any of the defendant's requested instructions, which were refused, is allowed.

Mr. Faulkner: That will take care of it.

The Court: And the same for the plaintiffs.

Mr. Faulkner: Yes. Now, I think, one more exception. We have got to state the grounds for these exceptions. I think that they do not state the law of libel as it exists today under the laws of Alaska and the decisions of the courts. I can't go into it any more than that without bringing out a lot of argument on cases. But I would like to make one more exception, and that is to the refusal of the Court to submit to the jury the verdict containing the special findings. That is all.

The Court: Well, with regard to the defendant's exceptions, I think practically all of these same objections were made and disposed of on the ruling of the Court on the motion for directed verdict and for which reason the exceptions are denied. However——

Mr. Faulkner: And would you—— [612]

The Court: Just a moment. That is true as to No. 3 in which we define the crime of, or define as to what is libelous per se; I do not see how that could be objected to; I think that is a correct statement of the law; that is a mere definition; as to the last paragraph with regard to malice, the distinction between legal and actual malice.

No. 4, in which the Court instructs the jury that there was here an imputation of crime, I am satisfied is correct and that the Court has that duty, much as I would like to avoid it.

And No. 5, I think that is also covered by previous rulings in the case. I cannot find that the statute, which I quoted to the jury in order that they may fully understand it, has any application to the illegal receipt and disbursement of public funds, which is referred to in the main part of these articles.

No. 6, we have previously discussed, except that counsel felt that we have limited the instruction to the previous finding. If the jury finds from the evidence that the publication complained of is, actually charged or imputed to the plaintiffs the crime of embezzlement, it is limited to that, and I think is a correct statement of law.

No. 7, we have already discussed, and I am still convinced that any such evidence, relating to the handling of this money by Mr. Coughlin, the purser, is not relevant. [613]

Instruction No. 8 I think we have previously—no—we have not previously fully discussed it. I find no

fault with which I am aware of the definition of the law with regard to the truth of the publication and the law with respect to privileged communications.

As to the matter of special questions or special form of verdict, again I feel that such would not be proper here and, particularly, the forms of verdict as submitted by the defendant, which we should not consider to be submitted to the jury in this case, because counsel follows the theory, which the Court does not adopt at all, that, if the facts, what you call the facts, are true, then there is no libel and that you can say anything that you want by way of comment, and that, we find, is not the law. Comment also must be honest and fair, as well as facts, and for that reason especially, the questions which you propose to put to the jury would not be proper at all.

Do you have anything further, Mr. Kay?

Mr. Kay: Your Honor, on the question of the verdict, naturally, frankly, Mr. Nesbett has been absent from his office for a long time, some three weeks, because he was absent in Seattle prior to coming directly to Juneau and then to Ketchikan on this trial, and I have been gone about ten days; if the jury were to come in and return a verdict almost any hour of the night, I know for myself I would be very glad [614] to receive it so that we could depart Ketchikan tomorrow. I promised I would be in my office on Monday.

The Court: Well, you don't have to be here, do you, Mr. Kay? Couldn't you assign somebody here to—



Mr. Kay: I presume so, but I do not like to run out before they return a verdict.

The Court: I do not like to keep the whole staff waiting. I don't mind it myself.

Mr. Kay: Of course they wouldn't have to wait.

The Court: To have the whole staff wait after 11:00 o'clock is not right.

Mr. Kay: Very well, your Honor.

Mr. Faulkner: Then we understand, your Honor, that, where the Court yesterday did not give the instruction proposed by the defendant, it is considered that an exception is taken to that at that time.

The Court: Oh, yes. You may call in the jury, please.

(Whereupon, the jury returned and all took their places in the jury box; and the bailiffs were duly sworn to take charge of the jury; and the following occurred:)

The Court: I might state, in case you do not understand it, by leave of the Court you are also permitted to take any message from any juror if they want to communicate with their family or something like that of course. The jury may retire to consider their verdict. [615]

(Whereupon, the jury retired to the jury room at 4:30 o'clock p.m. in charge of the bailiffs to consider their verdict.)

(Thereafter, on the 21st day of November, 1955, at 10:00 o'clock a.m., at Ketchikan, Alaska; the Honorable Walter H. Hodge, United States District Judge, presiding; the plaintiffs attor-

neys appearing by W. C. Stump and E. E. Bailey, attorneys at law; the defendant appearing by H. L. Faulkner, its attorney; the sealed verdicts of the jury in each of the above-entitled causes were received, read in open court, and ordered filed; and thereafter the following occurred:)

Mr. Faulkner: If the Court please, is the reporter here?

The Court: Yes.

Mr. Faulkner: In the case of Gruening, Roden and Metcalf against the Empire Printing Company, first, I should like to have added to the name of counsel for defendant the name of Roger G. Connor, in our office, because I will be away and there may be some further proceedings. And I also wish to state, so that we can clear the record—it has nothing to do with the jury's verdicts—Mrs. Monsen was asked about the assets of the corporation, and she testified; now, my recollection of her testimony is that she testified there was a lot at Salmon Creek worth \$500.00 and a car and some miscellaneous [616] little stocks and bonds, and I want to state to the Court—those were distributed in August; they were not assets of the corporation at this time. I wanted to state that. I don't know whether the testimony makes that clear, but that has nothing to do of course with the trial and the verdicts in the case. And, another thing, I would like to be heard, when counsel prepares a form of judgment I should like to be heard on that, and I suppose that will be sometime hence, or have an opportunity to look it

over first before the Court signs it, so that, if we have any objections, we might make any objections to it.

The Court: Oh, surely.

Mr. Faulkner: I just call that to the attention of the Court: I assume that they would send us a copy and send you the original, and we will be in Juneau and are rather handicapped by having the attorneys for the plaintiffs in Anchorage, but if they send it to us in time, but if they don't—they probably might send it to the Court first; I don't know. They have done that before. I don't accuse them of doing it deliberately, but, perhaps inadvertently, they have called matters to the attention of the Court that we didn't know anything about, and it didn't do any harm, but in this case I would like it to be understood that we would have an opportunity to see the proposed judgment and to file any objections to it. [617]

The Court: It has been my practice, Mr. Faulkner, not to enter a judgment in a jury case, nor findings of fact and conclusions of law or judgment in a nonjury case, unless the form of the judgment is approved by opposing counsel or if it is lodged with the Court for at least three days.

Mr. Faulkner: We will do that very promptly when we receive it and know what it is.

The Court: Yes. So that that practice will be followed, and you will be given an opportunity to object of course to the judgment. That would be only as to form, however.

Mr. Faulkner: That is right. Then, your Honor,

when the Court adjourns here, I assume these records will be taken back to Juneau where the case was filed?

The Court: Oh, yes.

(End of Record.) [618]

United States of America,  
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled causes, Nos. 6725-A, 6726-A and 6727-A of the files of said court;

That I reported said causes in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 618, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled causes, to the best of my ability.

Witness, my signature this 24th day of March, 1956.

/s/ MILDRED K. MAYNARD,  
Official Court Reporter.

[Endorsed]: Filed May 24th, 1956.

CLERK'S CERTIFICATE

United States of America,  
Territory of Alaska, First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all Orders of the Court filed in the above-entitled cause, and constitutes the entire file in said cause as designated by the Appellant to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 26th day of March, 1956.

/s/ J. W. LEIVERS,  
Clerk of District Court.

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[Endorsed]: No. 15052. United States Court of Appeals for the Ninth Circuit. Empire Printing Company, a Corporation, Appellant, vs. Henry Roden, Ernest Gruening and Frank A. Metcalf, Appellees. Transcript of Record. Appeal From the District Court for the District of Alaska, First Division.

Filed: March 1, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit  
No. 15052

EMPIRE PRINTING COMPANY a Corporation,  
Appellant,

vs.

HENRY RODEN, ERNEST GRUENING and  
FRANK A. METCALF,

Appellees.

APPELLANT'S REQUEST THAT THE COURT  
CONSIDER ON APPEAL THE ORIGINAL  
EXHIBITS WHICH ARE NOT PRINTED

Comes now the appellant, Empire Printing Company, a Corporation, by its attorney H. L. Faulkner, Esq., and requests the Court to consider on the hearing in the above-entitled cause all exhibits introduced in the trial of this cause in the Court below and that they be considered without the necessity of printing them in the record, except such exhibits as have been printed, or requested to be printed.

This request is that the following mentioned exhibits be considered without the necessity of printing, namely, plaintiff's-appellant's exhibits numbers 1 to 7 and 10 to 14, inclusive, and defendants'-appellees' exhibits numbers A, B, D, F, G, H, I, J, K, L, M and N. This request is made for the reason that the exhibits are largely newspapers and newspaper clippings and that it would require a very great additional expense to print them and it would make the record unduly long.

Dated at San Francisco, California, March 6,  
1956.

/s/ H. L. FAULKNER,  
Attorney for Appellant.

[Endorsed]: Filed March 7, 1956.

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In the United States Court of Appeals  
for the Ninth Circuit  
No. 15052

HENRY RODEN,  
Plaintiff,  
vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

ERNEST GRUENING,  
Plaintiff,  
vs.

EMPIRE PRINTING COMPANY a Corporation,  
Defendant.

FRANK A METCALF,  
Plaintiff,  
vs.

EMPIRE PRINTING COMPANY a Corporation,  
Defendant.

CONSOLIDATED CASES

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANT ON APPEAL

Appellant proposes on its appeal to the United  
States Court of Appeals for the Ninth Circuit in

the above-entitled causes, which have been consolidated, to rely on the following mentioned points as error:

1. The court erred in holding and ruling, and instructing the jury, that since 12-2-1, ACIA 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal act for violation of that Section, no testimony could be introduced to show that any loss of public funds had occurred through appellees' violation of Section 12-2-1.

2. The Court erred in rejecting the testimony of Steve Homer under appellant's offer of proof and which testimony was offered to show a loss of public funds and which loss resulted in a violation by appellees of Section 12-2-1, ACIA 1949, and all other testimony of appellant tending to support the testimony offered through Steve Homer.

3. The court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (In this case the appellees admitted that they violated Section 12-2-1, ACIA 1949, and appellant offered to show a loss of public funds resulting from this violation of the law and that the loss of public funds was a violation of Section 65-5-63, ACIA 1949.)

4. The court erred in holding that the violations by appellees of Section 12-2-1, ACIA 1949, was not also a violation of Section 65-5-63, ACIA 1949.



5. The court erred in instructing the jury that the articles published by appellant, which are the basis of the action, constituted libel per se.

6. The court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that their loss by the appellees or others who had them in their possession was immaterial in these cases.

7. The court erred in holding that bank deposits and checking accounts do not constitute a loan, creating the relationship of debtor and creditor between the bank and the depositor.

8. The court erred in admitting in evidence, over the objection of appellant, a printed copy of a letter purported to have been written by Fred McGinnis (Plaintiffs' Exhibit No. 8).

9. The court erred in giving that portion of Instruction No. 3 which reads as follows:

“You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true,

would be cause for his removal from office, is actionable per se.

“These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enhancing his recovery.”

10. The court erred in giving Instruction No. 6 and particularly that portion of it which reads:

“the defendant must show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.”

11. The court erred in giving Instruction No. 7 where the court instructed the jury to disregard all testimony regarding the loss of public funds as not relevant to the issues involved and which instruction is based on the fact that appellant did not mention a loss of funds in the publication of September 25, 1952, and that therefore the loss of public funds was not an issue in the case and therefore was not relevant to the truth or falsity of the publication. In this connection defendant's proposed Instruction No. 22 was offered to the effect that the truth, whenever discovered, is a complete defense in a

libel action. The court erred in denying that instruction.

12. The court erred in giving to the jury Instruction No. 4 and particularly paragraph one thereof.

13. The court erred in giving a portion of Instruction No. 5 and particularly that part of it which reads as follows:

“You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution.”

14. The court erred in giving that portion of Instruction No. 5 which reads as follows:

“Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds.”

15. The court erred in giving Instruction No. 7 which reads as follows:

“During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry ‘Chilkoot’ by the purser.

“You are instructed to disregard all of such testimony as it is not relevant to the issues in-

involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.”

16. The court erred in giving the first paragraph of Instruction No. 8 for the reason that the rejection of the testimony offered to show the loss of public funds through the acts of appellees made it impossible for appellant to establish in detail the truth of the claim of loss of public funds so as to show the close parallel of the case to that of Oscar Olson. Furthermore, the court erred in stating that this was not pleaded whereas it was set forth in paragraph three, second affirmative defense.

17. The court erred in giving paragraph two on page two of Instruction No. 8, relating to retraction, as there was no retraction involved in the case.

18. The court erred in refusing to give defendant's proposed Instructions Nos. 4, 5, 6, 7, 8, the last paragraph of No. 9, No. 10, No. 11 with the exception of the last sentence thereof which the court did give, Nos. 12, 13, 14, 16, 18, 20, 22, 23, 24, 26, 27, 28, 29 and 30.

19. The court erred in submitting to the jury for its consideration the headlines in the publication of

September 25, 1952, entitled "Reeve raps graft, corruption."

20. The court erred in overruling appellant's motion for instructed verdicts and in permitting the cases to go to the jury.

21. The court erred in overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, and entering judgment for plaintiffs.

Appellant prays that the record be printed in accordance with the designation of "Parts of Record to Be Printed," and as filed and certified by the Clerk of the District Court.

Dated this 23rd day of April, 1956.

/s/ H. L. FAULKNER,  
Attorney for Appellant.

Affidavit of Mail attached.

[Endorsed]: Filed April 23, 1956.